Practice Alert[1]

Third Country Deportations and *D.V.D. v. DHS*

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The Department of Homeland Security (DHS) has dramatically escalated efforts to remove persons with final removal orders to third countries—without meaningful notice and an opportunity to seek protection if they fear they are likely to be persecuted, tortured, or killed if removed there. While "third country" removals are authorized by statute and occasionally have been used in the past, DHS now is seeking to effectuate them more frequently, threatening people with final removal orders with removal to countries where they have no prior ties and face dangerous conditions. Since January 20, 2025, DHS has removed, or attempted to remove, noncitizens to a maximum-security prison in El Salvador as well as to war-torn countries, such as Libya and South Sudan, to countries that have imprisoned them, such as Eswatini and South Sudan, and to countries that have engaged in chain refoulement, such as Ghana, Equatorial Guinea, and Mexico.

This practice alert provides an overview of the legal framework governing third country removals, in light of the Supreme Court's June 23, 2025 stay of the preliminary injunction previously in place in *D.V.D. v. DHS*, a certified nationwide class action concerning noncitizens who have a final removal order issued in removal proceedings under Section 240, 241(a)(5), or 238(b) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1229a, 1231(a)(5), or 1238(b) (including withholding-only proceedings under 8 C.F.R. § 1208.31). The case is litigated by the National Immigration Litigation Alliance (NILA), Northwest Immigrant Rights Project (NWIRP), and Human Rights First (HRF).

As a result of the Supreme Court's order, DHS is no longer required to provide the procedural protections ordered by the district court's preliminary injunction. The preliminary injunction is stayed pending disposition of both the government's appeal of the injunction in the First Circuit Court of Appeals and any subsequent timely filed petition of certiorari.

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1. What is a "third country"?

For purposes of this advisory and more generally, a third country is a country not previously designated for removal by either an immigration judge (IJ) or DHS in the underlying removal proceedings. IJs designate a country of removal in removal proceedings under § 240 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229a, or reasonable fear or withholding-only proceedings under 8 C.F.R. § 1241.8(e); DHS designates a country of removal in reinstatement proceedings under INA § 241(a)(5), 8 U.S.C. § 1231(a), administrative removal proceedings under INA § 238(b), 8 U.S.C. § 1228(b), or expedited removal proceedings under INA § 235(b), 8 U.S.C. § 1225(b).

The term "third country" is used because IJs in removal proceedings designate a country of removal (usually the noncitizen's country of origin) and, in some cases, also designate an alternate country of removal (usually a country of which they are a citizen or in which they hold or previously held status).[2] When DHS seeks to remove a person to a country other than the primary or alternate countries designated, the new country is known as a third country.

2. Does DHS have the authority to remove noncitizens to third countries?

Yes, DHS has the authority to remove noncitizens to a third country but only where removal to the country designated in the final order is "impracticable, inadvisable, or impossible." 8 U.S.C. § 1231(b)(2)(E)(vii); *see also* 8 U.S.C. § 1231(b) (outlining framework for designation). Historically, DHS has sought third country removal in certain cases where the individual has received protection against removal to the designated country (either withholding of removal under 8 U.S.C. § 1231(b)(3) or protection under the Convention Against Torture (CAT)), the designated country refuses to issue travel documents or does not recognize the person as a citizen or national, or the United States lacks formal relations with the country.

In a break from decades of policy and practice, DHS has abandoned adherence to the law and instead has unilaterally chosen where to remove a person. As the district court in *D.V.D.* already has found, however, the law requires DHS to provide meaningful notice and an opportunity to contest removal on the basis of a fear prior to removal to a third country.

3. What policies and practices are challenged in *D.V.D. v. DHS*?

The class action complaint in *D.V.D. v. DHS* challenges the following two policies and practices:

- DHS's policy of removing, or seeking to remove, individuals to third countries without providing notice and an opportunity to contest that removal if they have a fear of persecution or torture if removed to that third country; and

- DHS's February 18, 2025 policy directive instructing DHS officers to review for re-

[2] The law governing these designations is laid out in the complaint in *DVD*. It is also discussed in this NILA, NWIRP, and Florence Project practice advisory dated January 29, 2025, and entitled, Protecting Noncitizens Granted Withholding of Removal or CAT Protection Against Deportation to Third Countries Where They Fear Persecution/Torture.

detention and removal to third countries all cases of individuals who were previously released from immigration detention.[3]

4. What is the procedural history in *D.V.D. v. DHS*?

The lawsuit was filed on March 23, 2025, against the U.S. Department of Homeland Security, DHS Secretary Kristi Noem, U.S. Attorney General Pamela Bondi, and the superintendent of a local detention center where one of the named plaintiffs was detained.

On March 28, the district court entered a temporary restraining order blocking third country removals without notice and a meaningful opportunity to seek CAT protection. Defendants appealed the TRO and moved the district court to stay it. The district court denied the stay motion and issued a memorandum on the TRO on March 29.

On March 31, at least 6 class members were removed from Guantanamo to El Salvador. Plaintiffs' counsel believes the deportations were in violation of the TRO.[4]

The First Circuit denied Defendants' motion to stay the TRO on April 7. Meanwhile, Defendants also moved for an indicative ruling based on a March 30, 2025 policy memorandum (March 30 Memo) that DHS issued immediately following the TRO. Plaintiffs opposed that motion, arguing that the March 30 policy memo does not protect individuals with final removal orders.

On April 18, the district court certified a nationwide class and granted a preliminary injunction. Defendants appealed the preliminary injunction to the First Circuit and simultaneously filed a motion to stay it pending the appeal.

Following a hearing on April 28, the district court ordered disclosure of the names of class members on flights from Guantanamo to El Salvador on March 31 and April 13 and any additional flights. The district court also amended the preliminary injunction to clarify that Defendants must afford the procedural protections in the preliminary injunction prior to removing any class member from Guantanamo and prior to ceding custody or control to another entity in a manner that prevents provision of those protections.

On May 7, following credible reports of a flight to deport class members to Libya without

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[3] Plaintiffs have moved to enjoin the directive. However, as explained below, the focus of the district court's injunctive relief rulings has been to ensure procedural protections prior to any third country removal. Individual challenges to re-detention are discussed below. Class counsel will continue to challenge the February 18 re-detention directive as the case moves forward.

[4] On June 24, 2025, a former high-level official with the Department of Justice's (DOJ's) Office of Immigration Litigation filed a protected whistleblower claim alleging that high-level DOJ officials conspired to violate the *D.V.D.* TRO. The disclosure describes efforts to feign ambiguity in an unambiguous order, failing to disseminate the fact and terms of the injunction, and purposefully failing to respond to Plaintiffs' inquiries. *See* Protected Whistleblower Disclosure of Erez Reuveni Regarding Violation of Laws, Rules & Regulations, Abuse of Authority, and Substantial and Specific Danger to Health and Safety at the Department of Justice at 16-21, https://s3.documentcloud.org/documents/25982155/file-5344.pdf.

provision of the preliminary injunction protections, class counsel filed an emergency TRO motion. The court promptly issued a memorandum reiterating the terms of the preliminary injunction and making clear that any such removals would violate it. The court also ordered discovery related to the deportations of class members on the March 31 flight from Guantanamo to El Salvador.

On May 16, the First Circuit denied Defendants' motion to stay the preliminary injunction.

On May 20, after credible reports that DHS was attempting to remove class members to South Sudan, class counsel filed another emergency TRO motion. The court conducted emergency hearings on May 20 and 21. With respect to the class members en route to South Sudan, the court found that Defendants had violated the preliminary injunction and ordered a remedy. With respect to the class as a whole, the court issued a memorandum on the preliminary injunction, elaborating that a meaningful opportunity to be heard requires that Defendants provide a minimum of ten days to raise a fear claim.

On May 24, Defendants filed a motion to reconsider the court's rulings, which the district court swiftly denied on May 26.[5] On May 27, Defendants filed an application to stay the preliminary injunction and request for an immediate administrative stay with the U.S. Supreme Court. Plaintiffs opposed the application.

On June 23, the Supreme Court stayed the preliminary injunction. Defendants' appeal of the preliminary injunction is fully briefed before the First Circuit with argument scheduled in early February.

On December 16, 2025, the district court heard oral argument on Plaintiffs' motion for partial summary judgement and Defendants' motion to dismiss. As of the date of this update, the court has yet to issue a decision on either motion.

5. Who is a member of the nationally certified *D.V.D.* class?

Certified on April 18, 2025, the nationwide class is defined as:

> All individuals who have a final removal order issued in proceedings under Section 240, 241(a)(5), or 238(b) of the INA (including withholding-only proceedings) whom DHS has deported or will deport on or after February 18, 2025, to a country (a) not previously designated as the country or alternative country of removal, and (b) not identified in writing in the prior proceedings as a country to which the individual would be removed.

D.V.D. v. DHS, 778 F. Supp. 3d 355, 378 (D. Mass. 2025).[6]

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[5] Also on May 24, the district court granted Plaintiff O.C.G.'s motion for a preliminary injunction, ordering Defendants to work with Plaintiffs' counsel to facilitate his return to the United States.

[6] The class definition is also located at pages 23-24 of the Memorandum and Order on Plaintiffs' Motions for Class Certification and Preliminary Injunction.

6. What did the preliminary injunction in *D.V.D.* provide?

As discussed above, on April 18, 2025, the district court had granted a preliminary injunction, which was amended, reaffirmed, and clarified on April 30, May 7, and May 20. The preliminary injunction had provided the following procedural protections:

- Written notice of the third country, in a language that the noncitizen can understand, to the individual and their attorney, if any,
- An automatic 10-day stay between notice and actual removal,
- The ability to raise a fear-based claim for CAT protection prior to removal, and
  - If the noncitizen demonstrates "reasonable fear" of removal to the third country, DHS must move to reopen the noncitizen's immigration proceedings.
  - If the noncitizen does not demonstrate a "reasonable fear" of removal to the third country, DHS must provide a meaningful opportunity, and a minimum of fifteen days, for the noncitizen to seek reopening of their immigration proceedings.

D.V.D. v. DHS, 778 F. Supp. 3d 355, 392-93 (D. Mass. 2025); *see also* Electronic Order – Amended Preliminary Injunction, Dkt. 86 (clarifying applicability to Guantanamo); Memorandum and Order on Plaintiffs' Motion for Emergency Relief Dkt. 91 (clarifying that removals without required protections to Libya would have violated the preliminary injunction); Memorandum on Preliminary Injunction, Dkt. 118 (providing a ten-day stay between notice and removal).

7. Is the preliminary injunction in *D.V.D.* still in effect?

Unfortunately, it is not. On June 23, 2025, the U.S. Supreme Court, without any explanation, stayed the district court's preliminary injunction. *See DHS v. D.V.D.*, No. 24A1153 (S. Ct. Jun. 23, 2025). **As a result, the preliminary injunction is no longer in effect.**

The stay will remain in place while the government's appeal of the preliminary injunction is pending disposition before the First Circuit Court of Appeals **and,** if applicable, until the Supreme Court resolves any timely filed petition of certiorari.

8. What is DHS's current policy regarding third country deportations?

As stated above, on March 30, 2025, DHS issued a policy memorandum entitled Guidance Regarding Third Country Removals (March 30 Memo), outlining its policy on third country removals for individuals with final orders of removal pursuant to INA §§ 240, 241(a)(5), or 238(b). In its stay application to the Supreme Court, the government represented that these individuals are entitled to some "additional process, before any one of them is deported to a third country." Defendants' Application for Stay of Preliminary Injunction at 28, *DHS v. D.V.D.*, No. 24A1153 (S. Ct. Jun. 23, 2025).

On July 9, ICE issued "Guidance Regarding Third Country Removals" (July 9 Guidance) regarding DHS's now-operative March 30 Memo. The July 9 Guidance is identical to the March 30 Memo in most respects.

Under the March 30 Memo and July 9 Guidance, the following "process" applies:

- If the U.S. State Department receives credible diplomatic assurances from the third country that persons will not be persecuted or tortured, *no further process is provided*.

- If no such assurances are received:

    - ICE claims it will serve a "Notice of Removal" with interpretation.
    - Critically, ICE *will not* ask if the noncitizen has a fear of removal to that country.
    - If the noncitizen does not affirmatively articulate a fear, ICE may effectuate removal 24 hours after serving notice; however, in exigent circumstances, with approval from certain officials, ICE may execute removal with six hours' notice if ICE provides the noncitizen means and opportunity to speak with an attorney.
    - Only if the individual "affirmatively states a fear," will ICE refer them for a screening interview before U.S. Citizenship and Immigration Services. The interview will generally take place within 24 hours of referral.
    - At the interview, the person must establish it is "more likely than not" that they will be persecuted on a statutory ground or tortured in the third country.
    - If USCIS finds the noncitizen meets this standard:
        - USCIS will refer the matter to immigration court if the person was not previously in immigration court proceedings.
        - If the person was previously in immigration court proceedings, DHS will refer the matter to ICE to determine whether it will elect to file a motion to reopen or simply designate an additional country of removal.
    - If USCIS finds the noncitizen does not meet the screening standard, they will be immediately removed to the third country. *Id*.

As detailed here and here, the March 30 Memo and July 9 Guidance do not protect noncitizens' due process, statutory, and regulatory rights to notice and an opportunity to seek protection from persecution or torture.

9. What are possible third countries where clients might be removed?

Media sources report that, as of June 2025, the U.S. government "has reportedly pursued deals" to pressure foreign nations to accept third country deportations "with at least 53 countries, including many that are beset by conflict or terrorist violence."[7]

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[7] Nick Turse, *Trump's Global Gulag Search Expands to 53 Nations*, The Intercept (Jun. 25, 2025), https://theintercept.com/2025/06/25/trump-immigrant-deportations-supreme-court/; *see also* Adam Taylor, *Trump Administration Considers Adding 36 Countries to Travel Ban List*, Washington Post (Jun. 14, 2025) (describing Department of State memorandum considering restricting entry to citizens of 36 countries, in addition to the countries listed on the Administration's initial travel ban, which provided that those countries might be able to "mitigate" factors which led to their placement on the travel ban list were they to accept the removal of third country nationals).

Class counsel are aware of third country deportations to the following countries: El Salvador, Mexico, South Sudan, Rwanda, Eswatini, Ghana, Equatorial Guinea, Kosovo, and Uzbekistan, and has finalized a third-country removal agreement with Palau. Class counsel understand that the government is pursuing, or has pursued deals, to accept third country nationals with Sierra Leone and the Democratic Republic of the Congo and possibly also with Cape Verde and Burundi.

10. What steps can practitioners take if a client is subject to third-country removal?

- Advise clients to articulate the fear to a DHS officer as soon as they are informed that they may face removal to that country (or even in advance of notice, if feasible).

  Note: *D.V.D.* defendants claim *only* noncitizens (*not* counsel) may raise a fear claim. Class counsel in *D.V.D.* dispute this interpretation. This has not been past practice and many clients cannot assert fears on their own due to language barriers, physical or cognitive impediments, and/or logistical challenges to communicating with a DHS officer.

- If a client is detained, inform DHS in writing of all nondesignated countries to which the client would have a fear of removal and demand a stay of removal and reopening if DHS intends to deport the person to any of the identified countries. A downloadable Word version of a template letter from January 2025 is available on the practice advisories page of NILA's website.

- If DHS indicates an intention to deport a client to a third country to which they fear removal, consider filing an emergency motion to reopen and motion to stay removal. A downloadable template emergency motion to reopen and motion to stay removal (along with a template exhibit list, declarations, and proposed order) from January 2025 is available on the practice advisories page of NILA's website.

- If a client is detained and/or fears imminent third country deportation, file a habeas petition in the district of confinement seeking release and/or an order requiring DHS to provide notice and an opportunity to seek protection from persecution and/or torture prior to any third-country deportation.

- For clients in removal proceedings, request protection from removal to all possible countries, including by requesting a hearing or reopening to present their fear-based claim. Advise clients to state on the record (e.g., in direct testimony or cross-examination) all non-designated countries to which they may have a fear of removal.

11. Can *D.V.D.* class members file individual habeas petitions to challenge third-country deportation without notice or opportunity to seek protection from persecution or torture?

Courts may consider the existence of the class action in determining how to proceed in individual habeas petitions filed by *D.V.D.* class members.

Several courts of appeals have held that district courts have discretion to dismiss or stay individual actions that involve parties or issues that overlap with those in a pending class action. *See, e.g.*, *Horns v. Whalen*, 922 F. 2d 835 (4th Cir. 1991) (discussing cases from Third, Fourth, Fifth, Sixth, and Eighth Circuits); *Pride v. Correa*, 719 F.3d 11430 (9th Cir. 2013). The Ninth Circuit has recognized that, while a district court may have discretion to "dismiss those portions of [a] complaint which duplicate [a class action's] allegations and prayer for relief," it may not dismiss allegations that go beyond those in the class action. *Id*. at 1133; *see also Brewer v. Swinson*, 837 F.2d 802, 804 (8th Cir. 1988) ("While the general principle is to avoid duplicative litigation, the determining factors should be equitable in nature, giving regard to wise judicial administration.").

Thus, when drafting a habeas petition, emphasize that the individual is seeking relief that is not available through the *D.V.D*. litigation. For example:

- The petitioner cannot obtain injunctive relief through *D.V.D.* because the Supreme Court's has stayed the preliminary injunction; thus, the individual would be deported *before* a decision in *D.V.D.*

- The petitioner seeks to enjoin DHS from failing to provide a meaningful opportunity to seek *withholding of removal* prior to third-country removal; the complaint in *D.V.D.* does not seek preliminary or permanent classwide injunctive relief on that basis.[8]

- The petitioner raises a claim that the March 30 Memo is unlawful, as argued here, and/or that DHS failed to follow or apply it. This claim is not raised in the complaint in the *D.V.D.* litigation because DHS issued the March 30 Memo *after* the district court issued a TRO on March 28.

- The petitioner challenges the specific circumstances of their re-detention in violation of the regulations at 8 C.F.R. §§ 241.4, 214.13, 241.14. These claims are also not raised in *D.V.D*.

12. Can *D.V.D.* class members file individual challenges to ongoing detention or re-detention?

Yes. Although the complaint in *D.V.D*. challenges the February 18, 2025 re-detention directive, it does not raise individual detention claims. Class members may still file individual habeas petitions to challenge their re-detention or continued detention.

The third-country removal process may impact the detention or re-detention of two groups of *D.V.D.* class members:

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[8] Plaintiffs in *D.V.D.* did not seek classwide injunctive relief with respect to withholding of removal due to 8 U.S.C. § 1252(f)(1), which bars courts from "enjoin[ing] or restrain[ing] the operation of" specified provisions of the INA, including 8 U.S.C. § 1231, "other than with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated."

- Class members who recently won withholding of removal or CAT protection: These individuals are generally subject to mandatory detention for a period of 90 days, known as the removal period, while DHS tries to remove them to a third country. 8 U.S.C. § 1231(a)(1). This is common, even under prior administrations. If, however, this period becomes prolonged and DHS has not identified a third country, the person could file a petition for writ of habeas corpus arguing that their continued detention violates due process because their removal to a third country is not reasonably foreseeable. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

- Class members who have been released on an Order of Supervision and now face re-detention: This group includes individuals who won withholding of removal or CAT protection or are nationals of countries with whom the United States does not have formal relations. Many of these individuals regularly check in with ICE, either directly with ERO or via the Intensive Supervision Appearance Program (ISAP). The regulations at 8 C.F.R. §§ 241.4 and 241.13 govern the revocation of release. If revocation was improper under the regulations (e.g., the person did not violate the terms or conditions of release), these individuals may file a habeas petition challenging their detention as violating the regulations and due process. If DHS has not identified a third country, the person also can argue that their continued detention violates due process because their removal to a third country is not reasonably foreseeable. *See Zadvydas*, 533 U.S. at 701.