Practice Advisory [1]

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

Updated October 21, 2026

The U.S. Department of Homeland Security (DHS) has dramatically escalated efforts to remove persons with final removal orders to third countries—without meaningful notice or 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 routinely deporting people with final removal orders to countries where they have no prior ties and face dangerous conditions.

On September 29, 2026, the U.S. Supreme Court granted certiorari in *D.V.D. v. DHS*, a nationwide class action which challenges DHS' third-country removal policy as applied to noncitizens who have final removal orders 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). [2] Ten days earlier, the U.S. Court of Appeals for the First Circuit largely affirmed a district court order which had granted declaratory relief to the class and set aside DHS' third-country removal policy. In its September 29, 2026 order, the Supreme Court granted Defendants' application for a stay of the lower court decisions and converted the government's stay application to a petition for writ of certiorari, granted certiorari on an expedited schedule, identified three questions presented, and granted the Solicitor General leave to present additional questions. DHS' third-country removal policy remains in effect pending Supreme Court review.

This practice alert provides a brief overview of third-country removals, addresses the First Circuit and district court decisions and the issues the Supreme Court will review, and provides some suggested strategies. A template habeas petition accompanies this advisory.

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[2] The class is represented by the National Immigration Litigation Alliance (NILA), Northwest Immigrant Rights Project (NWIRP), and Human Rights First (HRF).

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I. Third Country Removal Overview

A. "Third Country" Definition

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).[3] When DHS seeks to remove a person *with a final removal order* to a country other than the primary or alternate countries designated, the new country is referred to as a third country and the process as third country removal.

Note that the following individuals are not members of certified class in *D.V.D. v. DHS*: individuals with final expedited removal orders (even if they are subject to third country removal); individuals whose asylum application has been pretermitted by an immigration judge pursuant to an Asylum Cooperative Agreement; and individuals subjected to 8 U.S.C. § 1182(f) (also known as suspension of entry and/or travel ban restriction).

B. Third Country Removal Authority

DHS has the statutory authority under 8 U.S.C. § 1231(b)(1) and (b)(2) to remove noncitizens to a third country *but only after* first pursuing removal to the designated country of removal or specified alternative country(ies) of removal. If DHS "is unable" to do so, *see* 8 C.F.R. § 1240.12(d), DHS must then follow the statutory sequencing for pursuing removal, including to the country(ies) of citizenship and then to countries where the person has a lesser connection as mandated in 8 U.S.C. § 1231(b)(1) and (b)(2). Only if these options are "impracticable, inadvisable, or impossible" may DHS pursue removal to a country willing to accept the person. 8 U.S.C. § 1231(b)(2)(E)(vii).

C. DHS' Policy Regarding Third Country Removal

DHS' third country removal policy is embodied in DHS' March 30, 2025, policy memorandum entitled "Guidance Regarding Third Country Removals" (March 30 Memo), and ICE's July 9,

[3] The law governing these designations is laid out in the complaint in *D.V.D.* 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.

2025 "Guidance Regarding Third Country Removals" (July 9 Guidance). 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. (Note: this is the ultimate standard for prevailing on a withholding of removal or CAT claim before an IJ).
    - 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.
        - Alternatively, ICE may designate another third country for removal.
    - If USCIS concludes that the noncitizen does not meet this heightened standard, they will be immediately removed to the third country. *Id*.

As discussed below, the district court found, and the First Circuit affirmed, that the March 30 Memo and July 9 Guidance do not protect noncitizens' rights to meaningful notice and an opportunity to seek protection from persecution or torture and vacated the policy. However, the vacatur is currently stayed.

D. Third Countries Receiving *D.V.D.* Class Members

Mexico receives the largest number of *D.V.D.* class members. Since January 20, 2025, about 20,000 *D.V.D.* class members have been removed to Mexico. Third Country Deportation Watch, https://www.thirdcountrydeportationwatch.org/ (last visited Oct. 15, 2026). Many class members report receiving a notice of intent to deport to Mexico.

Class counsel are aware of third-country removals to the following countries based on so-called diplomatic assurances: El Salvador, South Sudan, Rwanda, Eswatini, Ghana, Equatorial Guinea,

Kosovo, Uzbekistan, Palau, Cameroon, Central African Republic, Sierra Leone, Democratic Republic of the Congo, Burundi, St. Kitts and Nevis, Dominica, Paraguay, St. Lucia, and Uzbekistan.

Human Rights First, Refugees International, and Berkeley Human Rights Center are tracking third-country removal agreements, along with other types of third-country transfer agreements. *See* https://www.thirdcountrydeportationwatch.org/ for country-specific information. Additional information is available here: https://humanrights.berkeley.edu/projects/tracking-third-country-deportations-from-the-united-states/.

II. The *D.V.D. v. DHS* Litigation

A. Challenged Policies and Practices

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

- DHS's policy of removing, or seeking to remove, individuals to third countries without providing meaningful notice and an opportunity to raise any fear of persecution or torture they may have about removal to that third country; and
- DHS's February 18, 2025 policy directive instructing DHS officers to review for re-detention and removal to third countries all cases of individuals who were previously released from immigration detention, including persons granted withholding of removal and protection under CAT.

The First Circuit and district court decisions discussed below address only the first policy. Individual challenges to re-detention are discussed below.

B. The *D.V.D.* Class Definition

On April 18, 2025, the district court certified a nationwide class 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). Importantly, noncitizens do not need to do anything other than meet the class definition to be included in the class. Therefore, please do not reach out to class counsel to ask to be included in the case. Anyone who meets the criteria of the class definition is a *D.V.D.* class member.

It bears repeating that the following individuals are **not** members of certified class in *D.V.D. v. DHS*: individuals subject to final expedited removal orders under 8 U.S.C. § 1225(b); individuals whose asylum application has been pretermitted by an immigration judge pursuant to an Asylum

Cooperative Agreement; and individuals subjected to 8 U.S.C. § 1182(f) (also known as suspension of entry and/or travel ban restriction).

C. Key Decisions

1. Preliminary injunction-related decisions

The now-dissolved preliminary injunction decision issued by the district court on April 18, 2025, was amended, reaffirmed, and clarified by that court on April 30, 2025, May 7, 2025, and May 20, 2025, respectively, in response to the government's violations and attempts to violate the injunction. Collectively, these decisions 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).[4]

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). Because the stay would remain in place through any subsequent timely filed petition of certiorari, Plaintiffs sought an indicative ruling to dissolve the district court's preliminary injunction, which the lower courts allowed. *D.V.D. v. DHS*, Nos. 25-1393, 25-1631 (1st Cir. Feb. 28, 2026) (permitting remand to dissolve the injunction); *D.V.D. v. DHS*, 821 F. Supp. 3d 102 (D. Mass. 2026) (dissolving the injunction).

2. February 25, 2026 district court summary judgment decision

On February 25, 2026, the district court (a) rejected Defendants' jurisdictional arguments; (b) dismissed Plaintiffs' Freedom of Information Act and detention claims; (c) dismissed two claims as duplicative; (d) addressed Plaintiffs' statutory and due process claims on the merits; (e) explained the court's authority to grant declaratory relief and vacatur of DHS' third-countre removal policy; and (f) granted declaratory relief and set aside the policy. *See D.V.D. v. DHS*, 821 F. Supp. 3d 102 (D. Mass. 2026).

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[4] *See also* Electronic Order – Amended Preliminary Injunction, Dkt. 86 (clarifying applicability to Guantanamo and to removals carried out by another agency); 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).

Specifically, the district court issued 5 declarations:

- 8 C.F.R. § 1240.12(d) requires Defendants to first seek removal to the class member's designated or alternative country of removal specified in their final removal order before effecting third-country removal.
- 8 U.S.C. § 1231(b) requires Defendants to first seek removal to that class member's designated country of removal or country or countries of citizenship before effecting any third-country removal pursuant to 8 U.S.C. § 1231(b)(2)(E).
- Class members have the right to meaningful notice before removal to any third country.
- Class members have the right to a meaningful opportunity to raise a country-specific claim against removal before removal to any third country.
- Defendants' third-country removal policy, as embodied in DHS's March 30 Memo and ICE's July 9 Guidance, is unlawful.

The court also set aside DHS' third-country removal policy pursuant to 5 U.S.C. § 706(2)(A) as "not in accordance with law." *D.V.D.*, 821 F. Supp. 3d at 165. The decision was stayed by the First Circuit pending an expedited appeal.

3. September 18, 2026 First Circuit appeal decision

In its September 18, 2026, appeal decision, the First Circuit first addressed preliminary issues, holding that the nationwide class was properly certified. *D.V.D. v. DHS*, No. 26-1212, --- F.4th ---, 2026 WL 2797801, at *4-6 (1st Cir. Sept. 18, 2026). The court also affirmed the district court's jurisdiction over the case, finding that Plaintiffs' claims were not barred by 8 U.S.C. §§ 1252(a)(4), (a)(5), (b)(9), (g) or § 2242(d) of the Foreign Affairs Reform Restructuring Act of 1998 (FARRA). *Id*. at *6-11.

On the merits, the court affirmed the district court's declarations that class members have the right to meaningful notice before and the right to a meaningful opportunity to raise a country-specific claim before removal to any third country. *Id*. at *13-17. The court also affirmed that DHS' third-country removal policy is unlawful. *Id*. at *15, *17. The court did not affirm the district court's first two declarations regarding the sequence of looking for third countries that DHS must follow, finding that the named Plaintiffs lacked standing to raise that claim. *Id*. at *12.[5]

In finding DHS's policy unlawful, the First Circuit reasoned that:

- 8 U.S.C. § 1231(b)(3) entitles class members to "effective notice of an impending third country removal and a meaningful opportunity to raise any fear-of-persecution claim before removal to a third country." *Id.* at *13, *see also id.* at *12-14.
- The Convention Against Torture and implementing regulations similarly entitled class members to the same notice and meaningful opportunity to assert a fear-of-torture claim before any removal to a third country. *Id.* at *15-17.
- DHS Guidance was unlawful because it failed to protect class members' statutory rights

[5] However, the legal underpinnings for those claims are strong: individuals facing third-country removal despite the availability of removal to their designated country have a strong basis for seeking habeas relief.

to notice and the opportunity to present protection claims. *Id*. at *15-17,

The First Circuit also upheld the district court's order setting aside Defendants' third-country removal policy pursuant to 5 U.S.C. § 706(2)(A) as unlawful. *Id*. at *19-20. At the end of the decision, the First Circuit noted that "whether the government must offer to offer noncitizens who raise fear-based claims regarding a third-country removal an evidentiary hearing prior to removal . . . is neither ripe nor fully joined" and that "[a]ny lingering questions about the meaning of the final judgment should be raised with the district court in the first instance." *Id*. at *20 n.21.

On September 23, 2026, after confirming Defendants were not giving effect to the First Circuit's decision and had scheduled class members for third-country removal the next day, Plaintiffs filed an emergency motion, which the First Circuit granted in part, by dissolving its March 16, 2026 stay of the district court's decision. *D.V.D. v. DHS*, No. 26-1212 (1st Cir. Sept. 23, 2026). The next day, Defendants filed an emergency application to stay the First Circuit's decision.

4. September 29, 2026 Supreme Court stay and certiorari order

On September 29, 2026, the Supreme Court granted the Defendants' application for a stay of the First Circuit's decision and then construed the stay application as a petition for a writ of certiorari and granted the petition. *DHS v. D.V.D.*, No. 26-426, 2026 WL 2917860, at *1 (U.S. Sept. 29, 2026). The Supreme Court requested briefing on the following issues:

(1) Whether the district court had jurisdiction over the Plaintiffs' claims;
(2) Whether the district court had authority to enter classwide declaratory relief and APA vacatur under 8 U. S. C. §1252(f)(1);
(3) Whether the DHS' third-country removal Guidance is unlawful under 8 U.S.C. § 1231(b), the Due Process Clause, or FARRA/CAT and its implementing regulations; and
(4) Such other questions that the Solicitor General determines are appropriate for the proper disposition of the case.

Id. The Court also ordered argument to take place in December; it is now set for December 9, 2026.

Critically, an unexplained emergency stay ruling does not establish that the government is likely to prevail on the merits; indeed, the Supreme Court has affirmed rulings after staying them, *see, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 17-19 (2023), and reversed rulings it declined to stay, *see, e.g.*, *United States v. Texas*, 143 S. Ct. 51 (2022) (Mem.) (denying stay of district court order halting DHS Secretary's enforcement priorities guidance), *reversed by* 599 U.S. 670 (2023); *Biden v. Texas*, 142 S. Ct. 926 (2021) (Mem.) (denying stay for failure to show likelihood of success on challenge to DHS's rescission of the Migrant Protection Protocols), *reversed by* 597 U.S. 785 (2022).

III. Habeas and Other Strategies for *D.V.D.* Class Members

A. Habeas Claims Seeking Release from Detention (non-*D.V.D.*-related claims)

Many class members have claims challenging their re-detention or continued detention that are not contingent upon the outcome in *D.V.D.* or any third-country removal issue. It is important to assess whether these claims exist because, if successful, the district court can order release. There are two general sets of claims challenging detention or re-detention that manty *D.V.D.* class members can raise via a habeas petition:

1. Unlawful re-detention after prior release

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. ICE released many of these class members on an Order of Supervision (OSUP).

Most 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 or there have not been changed circumstances to justify redetention), these individuals may file a habeas petition challenging their detention as violating the regulations and due process. Note that some class members were never subject to an OSUP, and habeas courts have analyzed the legality of re-detention under these regulations as well.[6]

If DHS has not identified a third country and taken significant steps, including securing a travel document required for removal to that 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 v. Davis*, 533 U.S. 678, 701 (2001).

2. Unlawful continued detention after winning withholding of removal or CAT protection

Many class members who recently won withholding of removal or CAT protection remain detained. 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 was the general practice even under prior administrations. If, however, this period becomes prolonged—generally beyond 180 days—and DHS has not identified a third country and taken significant steps, including securing a travel document required for removal to that third country, the person could file a petition for writ of habeas corpus arguing that their

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[6] *See e.g.*, *Gadyan v. Noem*, No. 5:25-cv-03219-RGK-JDE, 2025 WL 4350121, at *4 (C.D. Cal. Dec. 18, 2025); *Diallo v. Joyce*, 817 F. Supp. 3d 202, 207, 209 (S.D.N.Y. 2025); *Centeno Pastrana*, No. CV 3:26-0486, 2026 WL 2283605, at *3 (S.D.W. Va. Aug. 7, 2026) (holding that DHS lacks statutory authority to detain noncitizens outside of the removal period and, in the alternative, that the regulations regarding revocation of release were not followed).

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).

Individuals who were previously released but have since been redetained may also assert a *Zadvydas* claim, arguing that the presumptive six-month period began when the removal order was issued and that DHS cannot restart the clock each time it redetains them.

B. Third Country Removal Habeas Claims (*D.V.D.* Claims)

1. Overview

While prudent to raise claims challenging re-detention or continued detention because the remedy is release, class members can also file habeas petitions raising third-country claims, amend or supplement existing habeas petitions, file notices of supplemental authority, or seek reconsideration of any denied motion for injunctive relief where a habeas petition remains pending. These filings should assert that the individual satisfies the requirements of *D.V.D.* class membership, that the district court and the First Circuit's rationale applies to the class member's third-country claims, and that the final declaratory and set aside relief issued and affirmed in *D.V.D.* is persuasive authority.

The filing also should explain that the Supreme Court's stay order is not determinative of the merits of the case and that the Supreme decision may ultimately decide the class members' claims. *See supra* Section II.C.4 (addressing Supreme Court stay order). In some circumstances, it may be prudent to ask the district court or the court of appeals (if the habeas is on appeal) to hold the case in abeyance to await the Supreme Court's decision in *D.V.D*.

See the accompanying template habeas petition raising third country claims.

2. Prayer for relief

To date, many habeas courts that have granted third-country removal claims have ordered some or all the protections that the district court previously ordered in the preliminary injunction decision that the Supreme Court subsequently stayed. *See supra* Section II.C. In many cases, these are the protections sought. However, now that two federal courts have held DHS' policy unlawful, habeas petitioners may wish to seek more robust relief, i.e., namely meaningful notice and an opportunity to be heard prior to any third country removal consistent with their statutory rights under the INA, FARRA, implementing regulations, and due process.

a. Meaningful notice

The district court declared that class members have the right to meaningful notice before any third country. The court concluded that the INA, regulations, and due process required such notice. *D.V.D.*, 821 F. Supp. 3d at 142-43. The First Circuit affirmed, concluding that it was required by the INA, FARRA, and the implementing regulations. *D.V.D.*, 2026 WL 2797801, at *15-17, 20.

The district court did not specify procedures to ensure meaningful notice of any third country removal. At a minimum, class counsel contends meaningful notice should require:

- written notice in a language that the noncitizen who would be subject to third-country removal can understand;
- written notice both to the noncitizen and their attorney (if they are represented); and
- at least a 15-day stay between written notice and actual removal to ensure that the individual has time to raise a fear-based claim.

The easiest way for DHS to provide meaningful notice is to provide the **same notice** that the statute and regulations require in the class member's original removal proceedings with respect to the third-country. That is:

- In proceedings under 8 U.S.C. § 1229a, the IJ "shall notify" the individual of their designated country of removal, and "shall also identify for the record" all alternative countries to which the person may be removed. 8 C.F.R. § 1240.10(f). DHS should move to reopened removal proceedings to allow it to notify/designate the third country.
- DHS officers issuing reinstatement orders under 8 U.S.C. § 1231(a)(5) must provide notice of a designated country. *See* 8 C.F.R. § 241.8(e) (referring to "the country designated in [the reinstatement] order"). DHS should reissue reinstatement orders to notify/designate the third country.
- DHS officers issuing removal orders under 8 U.S.C. § 1228(b) "shall designate the country of removal[.]" 8 C.F.R. § 238.1(f)(2); *id*. § 238.1(b)(2)(ii). DHS should reissue reinstatement orders to notify/designate the third country.

Such notice is supported by Supreme Court case law. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025) ("[N]otice must be afforded within a reasonable time and in such a manner as will allow [the noncitizen] to actually seek . . . relief").

It is also supported by statutory and regulatory protections affording the right to counsel and notice to counsel. *See e.g.*, 8 U.S.C. § 1229a(b)(4)(A); 8 U.S.C. § 1362; 8 U.S.C. § 1228(b)(4)(b); 8 C.F.R. § 292.5.

Finally, a 15-day automatic stay is supported by a 2001 draft form issued by the former Immigration and Naturalization Service and a 2020 draft notice issued by DHS, although neither was published. *See D.V.D.* Complaint ¶ 41; *D.V.D.*, 778 F. Supp. 3d. at 392-93.

b. Meaningful opportunity to be heard

The district court also declared that class members have the right to a meaningful opportunity to raise a country-specific claim against removal before removal to any third country. *D.V.D.*, 821 F. Supp. 3d at 167. The court concluded that the INA, regulations, and due process required such opportunity. *Id.* at 142-43. The First Circuit affirmed, concluding that it was required by the INA,

FARRA, and the implementing regulations. *D.V.D.*, 2026 WL 2797801, at *15-17, 20

The clearest way for DHS to provide a meaningful opportunity to raise a country-specific claim against removal (after being provided meaningful notice) is to provide the same opportunity with respect to the third country that the statute and regulations require in the class member's original removal proceedings. That is:

- If an immigration judge issued the removal order in removal proceedings under 8 U.S.C. § 1229a, DHS should file a motion to reopen with the immigration judge or Board of Immigration Appeals to allow it to notify/designate the third country. DHS also should stay removal until the final administrative adjudication of the motion to reopen. [7] Absent such action, the class member could lose the opportunity to seek protection *before* removal to a third country. Reopening "necessarily extinguish[es] the finality of [a] removal order." *Nken v. Holder*, 556 U.S. 418, 429 n.1 (2009). [8]

- If DHS issued the removal order in reinstatement proceedings under 8 U.S.C. § 1231(a)(5) or in administrative removal proceedings under 8 U.S.C. § 1228(b), DHS should provide notice by *reissuing* the order to designate the third country and permit the

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[7] Requiring the class member to file a motion to reopen would not ensure a meaningful opportunity to seek protection. *Compare D.V.D.*, 821 F. Supp. 3d at 134-35 (explaining the procedural limitations on motions to reopen filed by noncitizens), *with* 8 C.F.R. § 1003.23(b)(1) (explaining that the "time and numerical limitations" on motions to reopen or reconsider "do not apply to motions by DHS in removal proceedings pursuant to [INA § 240]"); *see also Nguyen v. Scott*, 796 F. Supp. 3d 703, 727 (W.D. Wash. 2025) (explaining that statutory and constitutional rights "cannot be satisfied by simply allowing the noncitizen to file a motion to reopen their removal proceedings; rather, the removal proceedings must be reopened so that a hearing can be held").

[8] Reopening may be limited to permitting only adjudication of the withholding and/or CAT claim to the newly designated third country. *Cf. Matter of Patel*, 16 I. & N. Dec. 600, 601 (BIA 1978) (referencing the BIA's authority to limit remands to a particular purpose). Under the doctrines of law of the case and/or collateral estoppel, practitioners can argue that any previous grant of protection should not be disturbed in reopened proceedings. *See, e.g.*, *Arizona v. California*, 460 U.S. 605, 618 (1983), *decision supplemented*, 466 U.S. 144 (1984) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); *cf. Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."). The relevant law-of-the-case test—and its application in the context of reopened immigration proceedings—varies by circuit. Readers are advised to research the relevant circuit case law.

Note that the regulations allow DHS to move to terminate CAT deferral. 8 C.F.R. § 208.17(d), 1208.17(c). In such cases, the regulations require the immigration court to schedule a hearing determine de novo whether the person is likely to be tortured if removed to the specified country. 8 C.F.R. § 208.17(d)(3), 1207.17(d)(3).

Reopening could change the class member's statute of detention from post-final order detention under 8 U.S.C. § 1231(a) to pre-final order detention under 8 U.S.C. § 1226(a), (c).

class member to articulate a fear to the designated country as set forth in 8 C.F.R. § 241.8(b), (e) (reinstatement) and § 238.1(f)(2), (f)(3) (administrative removal).[9] Thereafter, the class member should undergo reasonable fear and/or withholding only proceedings, during which removal should be automatically stayed. 8 C.F.R. §§ 208.31, 1208.31.[10]

In both scenarios, the "trier of fact shall determine whether the [noncitizen] has sustained [their] burden of proof, and shall make credibility determinations …." 8 U.S.C. § 1231(b)(3)(C); *see also* FARRA § 2242(a), (d) (channeling review of CAT "determination[s]" to federal appellate courts); 8 C.F.R. §§ 208.16(a)(1), (c) (providing for IJ hearings of CAT claims), 1208.16(a)(1), (c) (same).

- The withholding statute requires the "trier of fact," i.e., the IJ, to "determine whether the [noncitizen] has sustained [their] burden of proof, and . . . make credibility determinations." 8 U.S.C. § 1231(b)(3)(C). This language—which cross references the asylum statute's detailed burden and credibility provisions—and its implementing regulations unambiguously mandate an individualized hearing before an IJ. *See generally* 8 U.S.C. § 1229a; see also 8 C.F.R. §§ 208.16(a) (requiring a USCIS officer to refer withholding cases to an IJ to make final eligibility determinations), 1208.16(a) (same).

- Likewise, CAT eligibility must be determined after an evidentiary hearing before an IJ. *See* 8 C.F.R. §§ 208.16(c)(2), (c)(3); 1208.16(c)(2), (c)(3); FARRA § 2242(a). Notably, FARRA underscores the need for such a hearing by channeling review of individual CAT "determination[s]" to petitions for review. FARRA § 2242(d); *see also id*. § 2242(a) (establishing U.S. policy prohibiting removal where "there are substantial grounds for believing the person would be in danger of being subjected to torture") (emphasis added); 8 C.F.R. §§ 1208.16(c)(4), 1208.17(b)(1); *see also generally* 8 U.S.C. § 1252(a)-(b).

3. Responding to common government arguments

a. Supreme Court stay order as conclusive

The government is arguing that the Supreme Court's stay orders are conclusive evidence that Defendants will prevail on the merits. At least two circuit courts have accepted that argument in denying motions to stay removal pending appeal. *See*, *e.g.*, *Gakou v. Warden of Prairieland Det. Ctr.*, No. 26-10925, 2026 WL 3044209, at *1-2 (5th Cir. Oct. 10, 2026); *Ojukwu v. Lyons*, No. 26-3891, 2026 WL 3032742, at *2 (6th Cir. Oct. 9, 2026)

This argument is wrong. An unexplained emergency stay ruling does not establish that the government is likely to prevail on the merits; indeed, the Supreme Court has affirmed rulings after staying them, *see, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 17-19 (2023), and reversed rulings it

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[9] Upon reissuance, the class member should consider filing a petition for review within 30 days of reissuance to protect the right to judicial review. *See* NILA's practice advisory, *Riley v. Bondi*: Impact on Petitions for Review (July 2025).

[10] Note that class members in these proceedings continue to have a final removal order and thus, any detention is under 8 U.S.C. § 1231(a).

declined to stay, *see, e.g.*, *United States v. Texas*, 143 S. Ct. 51 (2022) (Mem.) (denying stay of district court order halting DHS Secretary's enforcement priorities guidance), *reversed by* 599 U.S. 670 (2023); *Biden v. Texas*, 142 S. Ct. 926 (2021) (Mem.) (denying stay for failure to show likelihood of success on challenge to DHS's rescission of the Migrant Protection Protocols), *reversed by* 597 U.S. 785 (2022).

Furthermore, when assessing the viability of injunctive or habeas relief in individual cases, courts are obligated to assess the petitioner's individual facts and circumstances, including weighing the specific allegations and evidence of irreparable harm that may befall the person absent court-ordered relief. In other words, regardless of the Supreme Court's stay orders, courts have an independent obligation to assess the merits of a relief request and cannot simply rely on an unexplained emergency stay ruling as determinative. This is especially true given that the Supreme Court itself will be deciding third-country claims this term.

b. *D.V.D.* as a non-opt out class

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. However, the government routinely argues that class members cannot bring their own habeas petitions because the class certified in *D.V.D.* is mandatory with no opportunity for class members to opt out, because of the "first to file" rule, and because of res judicata.

Because class members are not seeking the same relief as the relief sought through the *D.V.D.* case, district courts should reject the government's argument that they have no authority to adjudicate the individual habeas petitions due to the class action. *Cf*. Ojukwu v. Lyons, No. 26-3891, 2026 WL 3032742, at *3-4 (6th Cir. Oct. 9, 2026) (order) (denying a stay of removal pending appeal from dismissal of a mandamus action where the petitioner pursued the same policy-or-practice claim as the *D.V.D.* class).

Moreover, some district courts have declined to dismiss habeas petitions filed by individual class members due, in part, to the impact any delay in the *D.V.D.* adjudication would have on class members' ability to vindicate their rights.[12]

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[11] In general, 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.").

[12] *See, e.g.*, *Portela-Hernandez v. Trump*, No. 25-1633-BAH, 2026 WL 74042, at *10 (D. Md. Jan. 9, 2026) (finding it "counterintuitive" that class membership could prevent individual claims given that the class-wide relief is stayed and the stay "may very well be due to the classwide nature of the relief pursued in *D.V.D.*"); *Velasquez Benitez v. Crawford*, No. 2:26CV526, 2026 WL 2856197, at *5 (E.D. Va. Sept. 4, 2026), *report and recommendation*

Courts that have accepted the government's non-opt out argument have done so on the false premise that doing so preserves judicial economy or principles of comity.[13]

c. Jurisdictional arguments

The government commonly argues that habeas courts lack jurisdiction over third country claims. Please see the district court and First Circuit decisions rejecting the government's jurisdictional arguments. *D.V.D.*, 821 F. Supp. 3d at 126-42; *D.V.D.*, 2026 WL 2797801, at *6-11; *see also Ibarra-Perez v. United States*, 154 F.4th 989, 997 (9th Cir. 2025); *but see Gakou v. Warden of Prairieland Det. Ctr.*, No. 26-10925, 2026 WL 3044209 (5th Cir. Oct. 10, 2026) (concluding that § 1252(g) barred consideration of an emergency motion to stay removal pending appeal).

In addition, please see the following briefing in *D.V.D.*:

- District Court: Plaintiffs' Reply in Support of Partial Summary Judgment and Opposition to Defendants' Motion to Dismiss
- First Circuit: Plaintiffs' Appeal Brief
- Supreme Court: Plaintiffs' Stay Opposition

d. Merits arguments

Please see the district court and First Circuit decisions finding DHS' third-country removal policy unlawful. *D.V.D.*, 821 F. Supp. 3d at 143-163; *D.V.D.*, 2026 WL 2797801, at *12-17.

In addition, please see the following briefing in *D.V.D.*:

- District Court: Plaintiffs' Reply in Support of Partial Summary Judgment and Opposition to Defendants' Motion to Dismiss
- First Circuit: Plaintiffs' Appeal Brief
- Supreme Court: Plaintiffs' Stay Opposition

Notably, numerous district courts have granted habeas petitions finding DHS' third-country removal policy unlawful and/or ordering due process protections prior to any third-country

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adopted, 2026 WL 2856191 (E.D. Va. Sept. 22, 2026); *Torres-Huete v. Blanche*, No. 5:26-CV-00049, 2026 WL 2972175, at *7 (S.D. Tex. Aug. 6, 2026) *A.A.M. v. Andrews*, No. 1:25-cv-0514-DC-DMC, 2025 WL 3485219, at *6 (E.D. Cal. Dec. 4, 2025) (finding that "numerous courts" have "issued injunctive relief requiring identical, or substantially similar, third-country removal procedures as those articulated in the *D.V.D.* preliminary injunction" and collecting cases); *Kumar v. Wamsley*, No. C25-2055-KKE, 2025 WL 3204724, at *7 (W.D. Wash. Nov. 17, 2025) ("[B]y the time the issues of class-wide relief are resolved in *D.V.D.*, Kumar could be removed or subjected to further due process violations under the third country removal policy. The Court declines to exercise its discretion as to render Kumar without a remedy to enforce his due process rights.")

[13] *See, e.g.*, *Solis Nolasco v. Noem*, 820 F. Supp. 3d 398, 408 (D. Md. 2026); *Sanchez v. Bondi*, No. 1:25-CV-02287-CNS, 2025 WL 2550646, at *2 (D. Colo. Aug. 20, 2025).

removal.[14]

C. Other Strategies

In addition to a habeas action, consider the following strategies:

- Advise clients to articulate the fear to a DHS officer as soon as they are informed that they may face removal to a third country. Note: *D.V.D.* defendants claim *only* noncitizens (*not* counsel) may raise a fear claim. Class counsel dispute this interpretation. Many clients cannot express fear to ICE due to language barriers, physical or cognitive impediments, and/or logistical challenges. However, out of an abundance of caution, clients should be advised to articulate their fears directly where possible.

- File an emergency motion to reopen and motion to stay removal if DHS indicates an intention to remove to a third country.[15] However, many IJs will deny these motions as time barred, number barred, or speculative.

D. Deported Class Members Abroad

With limited exceptions, courts have been, and may continue to be, reluctant to exercise jurisdiction over class members who are abroad. However, if the class member was deported in violation of a court order preventing removal out of the district or while the action is pending, counsel can explore the possibility of seeking an order to facilitate their return through the pending action. Likewise, if the habeas action was pending at the time the third-country removal happened (even if a motion for injunctive relief was denied), counsel can argue that district court retains jurisdiction to adjudicate the merits of the habeas petition and that it is not moot because the court retains the authority to order the facilitation of return.

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[14] *See, e.g.*, *Vu v. Noem*, No. 1:25-cv-01366-KES-SKO (HC), 2025 WL 3114341, at *8 (E.D. Cal. Nov. 6, 2025); *Cruz-Medina v. Noem*, 806 F. Supp. 3d 536, 548 (D. Md. 2025); *Kumar v. Wamsley*, No. C25-2055-KKE, 2025 WL 3204724, at *5 (W.D. Wash. Nov. 17, 2025); *Sagastizado Sanchez v. Noem*, 802 F. Supp. 3d 992 (S.D. Tex. Oct. 2, 2025); *Esmail v. Noem*, No. 2:25-cv-08325-WLH-RAO, 2025 WL 3030589, at *7 (C.D. Cal. Sept. 26, 2025); *Nguyen v. Scott*, No. 2:25-cv-01398, 796 F. Supp. 3d 703, 727-35 (W.D. Wash. Aug. 21, 2025); *Azzo v. Noem*, 2025 WL 3535208 (S.D. Cal. Dec. 10, 2025); *Barka v. Mattos*, 2025 WL 3723998 (D. Nev. Dec. 23, 2025); *A.A.M. v. Andrews*, No. 1:25-cv-0514-DC-DMC, 2025 WL 3485219, at *6 (E.D. Cal. Dec. 4, 2025); *Portela-Hernandez v. Trump*, 2026 WL 74042 (D. Md. Jan. 9, 2026); *L.R. v. Noem*, 2026 WL 161605 (D. Nev. Jan. 21, 2026); *D.J.R.R. v. Genalo*, No. 26-CV-3124 (AMD), 2026 WL 1746716, at *3-4, *7-9 (E.D.N.Y. June 17, 2026; *Dia v. Raycraft*, No. 1:26-cv-1054, 2026 WL 1476507, at *4, *9 (W.D. Mich. May 27, 2026); *Guerra v. Blanche*, No. 2:26-cv-00498-GMN-MDC, 2026 WL 949027, at *4, *6 (D. Nev. Apr. 7, 2026); *Mbaba v. Perez*, No. 5:26-cv-00070, 2026 WL 917484, at *5, *12-13 (S.D. Tex. Feb. 13, 2026); *Lopez-Rivas v. Santacruz*, No. 5:26-cv-02169-AYP, 2026 WL 1288651, at *8-10, *12 (C.D. Cal. May 7, 2026); *Pham v. Warden*, No. 1:25-cv-01873-DC-AC (HC), -- F. Supp. 3d --, 2026 WL 849861, at *15-19 (E.D. Cal. Mar. 27, 2026).

[15] A downloadable template emergency motion to reopen, motion to stay removal, exhibit list, declarations, and proposed order are on the practice advisories page of NILA's website.