No. 26-426

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

D.V.D., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction over respondents' 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 government's Guidance on third-country removals is unlawful under 8 U.S.C. 1231(b), the Due Process Clause, or FARRA/CAT and its implementing regulations.*

* This Court also directed briefing on "[s]uch other questions that the Government determines are appropriate for the proper disposition of the case." We have determined that no additional questions warrant briefing here.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are the United States Department of Homeland Security; Markwayne Mullin, Secretary of Homeland Security; Todd Blanche, Attorney General; and Antone Moniz, Superintendent of the Plymouth County Correctional Facility. Individual petitioners sued in their official capacities have been automatically substituted for their predecessors in office. See Sup. Ct. R. 35.3.

Respondents (plaintiffs-appellees below), proceeding pseudonymously, are D.V.D.; M.M.; E.F.D.; and O.C.G., on behalf of themselves and absent class members.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 1-47) is available at 2026 WL 2797801. The opinion of the district court (J.A. 48-150) is reported at 821 F. Supp. 3d 102.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2026. On September 29, 2026, this Court treated the government's application for a stay as a petition for a writ of certiorari, and granted the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix to this brief. App., *infra*, 1a-67a.

INTRODUCTION

The rules governing removal of aliens from this country are a sovereign prerogative largely committed to the political branches. Congress has granted the Executive significant discretion in selecting the country to which an alien with a final order of removal will be sent—including a "third country" that is authorized by statute but not identified in the removal order. And while the United States has accepted certain humanitarian responsibilities not to remove an alien to a country where it determines he will likely face torture or certain forms of persecution, Congress did not specify procedures to make that determination in the context of third-country removals, leaving the matter to the Executive's broad discretion. In addition, Congress has imposed stringent bars on judicial review of legal questions arising from the Executive's actions taken to execute removal orders.

In March 2025, the Department of Homeland Security (DHS) issued a policy adopting a two-track process for determining whether an alien selected for removal to a third country is likely to face torture or persecution there. For countries that have given the United States diplomatic assurances deemed credible that no aliens will be tortured or persecuted upon removal there, DHS will treat those assurances as conclusive. For countries without such assurances, the alien will receive actual notice of the proposed country and an opportunity for a prompt screening of any asserted fear of removal there.

That policy solved a serious problem that had long plagued this Nation. The United States is often unable to remove aliens to their home countries—whether because they have been granted protection from removal there, or because those countries refuse to accept them

for various reasons, including that many of them have serious criminal histories. Absent a viable system for third-country removals, such aliens often were released. That gave such aliens a compelling, perverse incentive to raise meritless fear-based claims. It also inflicted predictable and tragic consequences, as criminal aliens—including class members here who have been convicted of murder, armed robbery, sexual assault of minors and the mentally disabled, and more—have ravaged American communities. See D. Ct. Doc. 129-1, at 1-9 (May 23, 2025). The policy fixes those longstanding failures, while also accounting for our humanitarian obligations. And its directive to remove aliens swiftly once a third country is identified is essential, as finding a willing country often entails delicate diplomatic negotiations that would be undermined by lengthy delays. See C.A. Doc. 118413581, at 3-4 (Mar. 5, 2026).

The decisions below jeopardize all of that. The lower courts invalidated the policy on the grounds that the immigration laws and the Constitution require greater notice and opportunity to raise claims that an alien will be persecuted or tortured in the third country selected by DHS. But the relevant statutes and regulations say nothing about procedures to evaluate such claims in the context of third-country removals. The lower courts insisted that the notice-and-opportunity procedures that they demanded were "implicit" in those authorities. But vague due-process concerns do not license courts to engraft new procedures on plain text, or to augment the procedures that the Executive has adopted to aid its own decision about whether an alien will face maltreatment abroad. At any rate, there is no due-process problem here. To the extent that the Constitution entitles aliens to any process beyond what the political branches

provide—which it does not for the many class members who never obtained admission to this country in the first place—the policy's two-track scheme easily meets the minimal requirements of the Due Process Clause in this context where deference to the Executive is at its acme.

In all events, under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the courts below clearly lacked jurisdiction even to reach the merits. Congress specifically decreed that no district court "shall have jurisdiction" over "any cause or claim" "arising from the decision or action" to "execute removal orders against any alien." 8 U.S.C. 1252(g). And Congress more generally provided that "no court shall have jurisdiction" to review "questions of law and fact" "arising from any action taken" to "remove an alien," except through a petition for review of a final removal order. 8 U.S.C. 1252(b)(9). Congress also expressly precluded district-court jurisdiction over any claims "under" the Convention Against Torture. 8 U.S.C. 1252(a)(4). The lower courts improperly disregarded all of those jurisdictional bars by inventing atextual limitations and invoking practical concerns.

At a minimum, the lower courts violated the INA's bar on classwide remedies that "enjoin or restrain" the operation of the statute's removal provisions. 8 U.S.C. 1252(f)(1). They tried to end-run that bar by framing the relief as a series of declaratory judgments and a universal vacatur of the policy, rather than as a permanent injunction. But the "enjoin or restrain" language covers coercive declarations that invite follow-on injunctions, for lower courts may not do in two steps what they are barred from doing in one. So too for the vacatur, which likewise restrains agency officials from implementing the policy's third-country-removal procedures.

This Court has stayed three attempts by the lower courts to halt the challenged policy. It should now definitively allow the policy to remain in effect. The policy marks the considered judgment of the Executive Branch about how best to fulfill its humanitarian obligations while also finally facilitating the removal of aliens who have been able to avoid removal (sometimes for years), often because of their dangerousness. The lower courts had no jurisdictional authority or merits basis to set aside the policy, much less fashion their own process that achieves only delay and obstruction. While the aliens at issue may benefit from stalling their removal even further, the Nation does not.

STATEMENT

A. Background

1. The INA authorizes the removal of classes of aliens from the United States. See, *e.g.*, 8 U.S.C. 1182(a), 1227(a), 1231(a). The removal process can include a hearing before an immigration judge, an appeal to the Board of Immigration Appeals (BIA), and a petition for review in a court of appeals. See 8 U.S.C. 1229a, 1252(a). Many aliens facing removal have an opportunity to apply for relief or protection from removal. See, *e.g.*, 8 U.S.C. 1158 (asylum).

Congress also has established an expedited-removal system for certain aliens. See 8 U.S.C. 1225(b)(1). Under that system, certain inadmissible aliens receive speedy administrative review of any asserted fears of persecution in the country to which they will be removed; they are not entitled to judicial review of an adverse administrative determination. See *DHS* v. *Thuraissigiam*, 591 U.S. 103, 109-113 (2020). Congress further has established streamlined processes for removing certain aliens convicted of aggravated felonies

and for reinstating removal orders against aliens who unlawfully reenter the country after having been removed. See 8 U.S.C. 1228(b), 1231(a)(5).

2. The INA establishes a sequence and criteria for the government to determine the country to which an alien will be removed. 8 U.S.C. 1231(b)(1) and (2).[1] Possible destinations include a country designated by the alien, the alien's country of citizenship, and the alien's previous country of residence. See *Jama* v. *ICE*, 543 U.S. 335, 338-341 (2005). But the Executive retains broad discretion about where to send an alien, as it may generally decline to send an alien to listed countries on grounds like impracticability or prejudice to national interests. See, *e.g.*, 8 U.S.C. 1231(b)(1)(C)(iv) and (2)(E)(vii). Section 1231(b) thus offers a fail-safe option: any other country whose government "will accept the alien." *Ibid.* Such countries may be selected even if not identified in an alien's removal order. See 8 C.F.R. 1240.12(d).

Congress also has provided two means for an alien to challenge removal to a country where he may face persecution or torture. First, an alien may seek withholding of removal under 8 U.S.C. 1231(b)(3). Statutory withholding generally prohibits removing an alien to a country if the government determines that he would face persecution there because of his "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). Second, the alien may seek protection under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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[1] The statute refers to the Attorney General, but Congress transferred enforcement of certain INA provisions to the Secretary of Homeland Security. *Nielsen* v. *Preap*, 586 U.S. 392, 397 n.2 (2019).

(CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85—a non-self-executing treaty under which state parties agreed not to return a person to a country where there is substantial danger the individual would be tortured. See Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822 (statute directing Executive to implement CAT by regulation); 8 C.F.R. 208.16-208.18, 1208.16-1208.18.

Ordinarily, an alien raises a withholding or CAT claim during removal proceedings, where the immigration judge decides both the alien's removability and claims for protection from removal. See, *e.g.*, 8 C.F.R. 1240.1(a)(1)(iii), 1240.12(c). But withholding and CAT claims can also arise outside of those proceedings. For example, an alien subject to a reinstated order of removal may seek "withholding-only" relief. *Riley* v. *Bondi*, 606 U.S. 259, 265 (2025). And an alien subject to expedited removal may raise a fear of persecution or torture. See *Thuraissigiam*, 591 U.S. at 110 n.5.

Statutory withholding and CAT protection affect only *where*, not *whether*, an alien may be removed. See *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 536 (2021). When an alien receives such country-specific protection, the government "retains the authority to remove the alien to any other country authorized by [Section 1231(b)]," because the removal order "remains in full force." *Ibid.* The statute and regulations do not set forth any particular procedures the government must follow in making withholding or CAT determinations in the specific context of third-country removals.

3. On President Trump's first day back in office, he determined that the millions of aliens who have illegally

crossed the border pose a serious threat to national security. Exec. Order No. 14,165, 90 Fed. Reg. 8467 (Jan. 30, 2025). The President thus directed DHS to take "all appropriate actions" to detain and remove aliens who have been ordered removed, but who nevertheless have been "released into the United States." *Id.* at 8468. In February 2025, DHS issued guidance directing U.S. Immigration and Customs Enforcement (ICE) to review cases of aliens who had been ordered removed, but whose removal was impeded. J.A. 207. DHS directed ICE to, *inter alia*, "determine the viability of removal to a third country" for such aliens, especially "in light of the Administration's significant gains with regard to previously recalcitrant countries." *Ibid.*

Such third-country removals are not uncommon. Sometimes the countries identified in a removal order are not viable options by the time DHS is prepared to remove the alien. For example, countries are often reluctant to accept murderers, rapists, sexual abusers, and other violent felons, even if they are from that country. See D. Ct. Doc. 129-1, at 1-9 (collecting examples of criminal aliens not promptly removed). Or an alien may obtain withholding or CAT protection from the only country listed in his removal order. In such instances, third-country removal is the only way for DHS to exercise its "authority" under Section 1231(b) to execute final removal orders. See 8 C.F.R. 1240.12(d). And as a practical matter, that third country often falls within Section 1231(b)'s catch-all provisions allowing removal to any country willing to accept the alien.

On March 30, 2025, DHS clarified its "policy regarding the removal of aliens with final orders of removal pursuant to sections 240, 241(a)(5), or 238(b) of the [INA] to countries other than those designated for re-

moval in those removal orders." J.A. 306; see J.A. 306-309.[2] A substantially similar memo on July 9 affirmed that policy (together with the March memo, the Guidance). J.A. 310-313. The Guidance distinguishes between countries that have provided credible assurances that any aliens removed there will not be persecuted or tortured, and countries that have not.

For countries that have provided such assurances, "the alien may be removed without the need for further procedures." J.A. 307, 311. For countries that have not, DHS first provides actual notice to the alien of the country of removal (read to him in a language he understands) and gives him an opportunity to "affirmatively express a fear of persecution or torture" there. J.A. 308. DHS "will generally wait at least 24 hours following service of the Notice of Removal before effectuating removal." J.A. 311. If an alien expresses such a fear about the country of removal, an asylum officer will conduct a prompt screening to determine whether he "would more likely than not be" persecuted or tortured there. J.A. 312. If the alien fails to satisfy that standard, he "will be removed." *Ibid.* If he does satisfy it, he will be put into additional administrative procedures, consistent with how withholding and CAT claims typically are handled. J.A. 312-313. "Alternatively, ICE may choose to designate another country for removal" and start the process afresh. J.A. 313.

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[2] Section 240 is 8 U.S.C. 1229a ("Removal proceedings"); Section 241(a)(5) is 8 U.S.C. 1231(a)(5) ("Reinstatement of removal orders against aliens illegally reentering"); and Section 238(b) is 8 U.S.C. 1228(b) (expedited "[r]emoval of aliens who are not permanent residents" and convicted of an aggravated felony).

B. Proceedings Below

1. Respondents are four aliens subject to final orders of removal. J.A. 227-230. In March 2025, they filed this putative class action, alleging that there are "valid reasons to fear removal to specific countries that were not included in their removal orders." J.A. 230. Each respondent claimed, among other things, that due process requires additional "notice and an opportunity to be heard prior to removal to a country that was not designated in their removal orders." *Ibid.*

In April 2025, the district court granted respondents' motion for class certification and issued a classwide preliminary injunction. J.A. 219-279.[3] After concluding it had jurisdiction, including to issue classwide relief, the court held that the Guidance likely violated due process because it did not provide "notice and a meaningful opportunity to present fear-based claims" under CAT. J.A. 265; see J.A. 265-273, 278 n.51. The court ordered DHS to (1) provide written notice to aliens and counsel of the third country to which they might be removed; (2) provide aliens with a "meaningful opportunity" to assert a fear of removal; (3) use a "reasonable fear" standard, rather than a "more likely than not" standard, to assess the credibility of those assertions; and (4) pro-

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[3] The class definition is:

> 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.

J.A. 247.

vide dissatisfied aliens at least 15 days to "move to reopen immigration proceedings." J.A. 276-277 & n.48.

In May 2025, the district court "clarif[ied]" that the injunction's reference to a "meaningful opportunity" to "raise a fear-based claim" meant "a minimum of ten days." J.A. 285 (emphasis omitted). The court ordered various remedial measures, including that each alien "be given a reasonable fear interview in private"; that "counsel of their choosing [be] present"; that the alien and his counsel "be given no fewer than 72-hours' notice of the scheduled time for each reasonable fear interview"; and that the government provide periodic status reports to the court. J.A. 287-288.

The Secretary of State explained that the injunction would "cause significant and irreparable harm to U.S. foreign policy" by undermining delicate diplomatic negotiations with third countries to accept these aliens. D. Ct. Doc. 130-1, at 2, ¶ 3 (May 23, 2025). And ICE explained that the court-ordered delays would disrupt and thus effectively prevent third-country removal operations, which often involve "significant logistical difficulties" to coordinate flights, pilots, crews, country clearances, and foreign law-enforcement across multiple countries. D. Ct. Doc. 130-2, at 8, ¶ 24 (May 23, 2025); see *id.* at 8-10, ¶¶ 26-28.

2. On June 23, 2025, this Court stayed the preliminary injunction in full. 145 S. Ct. 2153 (No. 24A1153). Later that same evening, the district court issued an order asserting that its May remedial order "remains in full force and effect, notwithstanding today's stay of the Preliminary Injunction." D. Ct. Docket Entry No. 176. On July 3, 2025, this Court granted the government's motion to clarify that the June 23 stay of the prelimi-

nary injunction necessarily barred the district court from enforcing that injunction. 145 S. Ct. 2627.

The district court then granted respondents' motion for an indicative ruling that it would "dissolve the preliminary injunction if the First Circuit remanded [the] appeal for that purpose." D. Ct. Doc. 212, at 4 (Aug. 28, 2025). The court of appeals remanded the case, D. Ct. Doc. 239 (Feb. 20, 2026), and the district court dissolved the preliminary injunction, J.A. 67.

3. In February 2026, the district court issued a final judgment granting summary judgment to respondents on their claims that the Guidance violates the Due Process Clause and 8 U.S.C. 1231(b), while dismissing the remaining counts. J.A. 48-150. As relevant, the court held that it had jurisdiction, that the INA does not preclude classwide coercive relief, and that the Guidance violates both due process and Section 1231(b) because it does not provide class members adequate notice or opportunity to raise withholding or CAT claims before being removed to a third country. J.A. 149-150.

The district court declared DHS's "third-country removal policy, as embodied in" the Guidance, to be "unlawful," and universally vacated that policy. J.A. 152. Relevant here, the court declared that class members have the right "to meaningful notice before removal to any third country" and "to a meaningful opportunity to raise a country-specific claim against removal before removal to any third country." *Ibid.*

5. The First Circuit granted a stay pending appeal, C.A. Doc. 118417272 (Mar. 16, 2026), but in September 2026, it affirmed the district court's judgment in relevant part, J.A. 1-47. The court of appeals adopted the district court's jurisdictional and remedial analyses, J.A. 14-27, 42-46; and it agreed that Section 1231(b) re-

quires notice and an opportunity to raise statutory withholding claims before a third-country removal, J.A. 30-37. The court of appeals declined to hold the Guidance unconstitutional (unlike the district court), but invoked the same considerations to hold that, under constitutional avoidance, FARRA itself imposes the same procedural requirements for CAT claims. J.A. 37-42.

6. After the First Circuit dissolved its stay pending appeal, C.A. Doc. 118513248 (Sept. 23, 2026), this Court stayed the district court's order, treated the government's stay application as a petition for a writ of certiorari, and granted the petition.

SUMMARY OF ARGUMENT

I. The district court lacked jurisdiction over respondents' claims. 8 U.S.C. 1252(g) specifically provides that no district court "shall have jurisdiction" over "any cause or claim" "arising from the decision or action" to "execute removal orders against any alien." The lower courts misread Section 1252(g) as limited to challenges to the government's exercise of discretion, not its authority. But that limitation has no basis in the text and would render the statute effectively toothless, as it is easy to restyle any challenge to the government's discretion as a challenge to its authority.

In addition, 8 U.S.C. 1252(b)(9) more generally provides that "no court shall have jurisdiction" to review any "questions of law and fact" "arising from any action taken" to "remove an alien," except through a petition for review of a final removal order. Whether the government's procedures for removing aliens to third countries are adequate is a question of law and fact arising from actions taken to remove those aliens. The lower courts' practical concerns with that conclusion cannot override the plain statutory text.

Section 2242(d) of FARRA and 8 U.S.C. 1252(a)(4) further preclude district-court jurisdiction over claims "under" CAT, which includes respondents' statutory and constitutional claims based on CAT. The lower courts' contrary reasoning that a claim is only "under" a statute providing the cause of action would nullify these jurisdictional bars, because CAT and FARRA provide no cause of action at all.

II. The district court lacked authority to enter classwide relief under 8 U.S.C. 1252(f)(1), which strips lower federal courts of authority to "enjoin or restrain the operation" of the INA's removal provisions on a classwide basis. That language covers coercive declaratory judgments that inhibit how the defendant may act and invite follow-on injunctions to enforce compliance. This Court has interpreted similar statutory language to encompass coercive declaratory relief, *e.g.*, *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982), which defeats the lower courts' emphasis on the lack of an explicit reference to declaratory relief. For the same reasons, Section 1252(f)(1) also bars the universal vacatur here, which "check[s], hold[s] back, or prevent[s]" agency officials from carrying out third-country removals under the Guidance. *Garland* v. *Aleman Gonzalez*, 596 U.S. 543, 549 (2022). That was the entire point.

III. In all events, the Guidance is lawful. It does not violate any statutory or regulatory provision because neither Section 1231 nor FARRA (nor their implementing regulations) sets forth specific procedures for third-country removals at all. Indeed, filling that gap was the reason for the policy. The Guidance also comports with due process. It ensures that any alien will either be sent to a country where the United States has secured a credible assurance that no alien will be tortured or per-

secuted, or will be given actual notice and an opportunity for a prompt review as to any affirmative fear of removal. Whatever the Due Process Clause may require in this context involving immigration and foreign affairs—where the Executive is entitled to the greatest deference—it demands no more than that.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER RESPONDENTS' CLAIMS

Respondents challenge their removals to third countries under valid removal orders on the ground that the government must afford them more process before executing those removals. But the INA precludes district-court jurisdiction over, among other things, "any" claims "arising from" the "decision or action" to "execute removal orders," 8 U.S.C. 1252(g), as well as "all" questions "arising from" an "action taken or proceeding brought to remove an alien," 8 U.S.C. 1252(b)(9). Those jurisdictional bars unambiguously cover respondents' claims. And the CAT-related claims are also covered by CAT-specific jurisdictional bars. 8 U.S.C. 1252(a)(4); FARRA § 2242(d), 112 Stat. 2681-822.

A. Section 1252(g) Precludes Jurisdiction

1. The INA specifically prohibits district courts from exercising jurisdiction over suits like this one that challenge actions taken to execute removal orders. It states that, "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), * * * no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [government] to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. 1252(g).

Section 1252(g) clearly covers respondents' claims. Respondents challenge the country to which they are to be removed because the government's procedures for determining that country are supposedly deficient. A claim about where an alien will be removed is, *ipso facto*, a "claim" "arising from the decision or action" to "execute [a] removal order[]." 8 U.S.C. 1252(g).

To "execute" a removal order means to "perform" or "complete" the removal. *Black's Law Dictionary* 567 (6th ed. 1990). And "the decision" to perform or complete the removal, 8 U.S.C. 1252(g), necessarily includes deciding whether, when, *and where* to remove the alien. That includes removal to a third country not identified in the order, which incorporates "the authority of [DHS] to remove the alien to any other country as permitted by [Section 1231(b)]." 8 C.F.R. 1240.12(d). At a minimum, identifying a third country is an "action" to perform or complete the removal ordered, and respondents' claims "aris[e] from" that action. 8 U.S.C. 1252(g).

If the government were not executing an alien's removal order, the alien would not even be a member of the class here, much less have standing to challenge the Guidance. See J.A. 247. Similarly, the relief entered bars the government from continuing to execute removal orders through third-country removals without engaging in the district court's added procedures. See J.A. 152. That confirms that each class member's claim arises from the government's actions to execute his removal order.

That plain-text conclusion also follows directly from *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). The Court there emphasized that, while Section 1252(g) does not "cover[] the universe of deportation claims," it does apply to the

"discrete acts of 'commencing proceedings, adjudicating cases, and executing removal orders.'" *Id.* at 482-483 (brackets omitted). *AADC* thus held that Section 1252(g) "squarely" applied to a selective-prosecution claim challenging the government's "decision to 'commence proceedings' against" particular aliens. *Id.* at 487; see *id.* at 472. Likewise, Section 1252(g) squarely applies to respondents' procedural claims challenging the government's decision to "execute removal orders" through prompt third-country removals.

2. The lower courts brushed aside Section 1252(g) primarily on the theory that it "reaches only claims based on DHS's exercise of prosecutorial discretion" or "challenges to decisions or actions to deny request for *discretionary* relief from removal." J.A. 15, 18; see J.A. 15-21, 70-74. But nothing in Section 1252(g)'s text is limited to discretionary acts. Congress has included such limits elsewhere in the INA (including in Section 1252 itself), but not in Section 1252(g). *E.g.*, 8 U.S.C. 1252(a)(2)(B); 8 U.S.C. 1226(e); cf. *Mullin* v. *Doe*, 609 U.S. 324, 340-342 (2026) (rejecting a similarly atextual argument that a judicial-review bar did not cover procedural determinations, only substantive ones).

The First Circuit's narrowing of Section 1252(g) to cover only discretionary acts "would gut the jurisdictional limits set by Congress." *Camarena* v. *ICE*, 988 F.3d 1268, 1274 (11th Cir.), cert. denied, 142 S. Ct. 424 (2021); accord *Silva* v. *United States*, 866 F.3d 938, 940 (8th Cir. 2017). As the district court observed, "it is not within the 'discretion' of the Executive to exceed the scope of its authority or otherwise violate the law." J.A. 70. It is thus simple to restyle almost any challenge to the government's discretion as a challenge to its authority—*e.g.*, that the decision violates due process or

is arbitrary and capricious. See *Tazu* v. *Attorney General*, 975 F.3d 292, 298 (3d Cir. 2020); *E.F.L.* v. *Prim*, 986 F.3d 959, 965 (7th Cir. 2021). And the First Circuit's theory, if accepted, would open the door not just to suits like this one under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*, but to tort claims for money damages. *E.g.*, *Ibarra-Perez* v. *United States*, 154 F.4th 989 (9th Cir. 2025); see J.A. 17, 19 (favorably citing *Ibarra-Perez*).

The discretion-versus-authority line also would improperly make jurisdiction "dependent upon the merits of the claim," *Garland* v. *Aleman Gonzalez*, 596 U.S. 543, 554 (2022), as the question whether an act is discretionary (and thus non-reviewable) would turn on whether it is claimed to be unlawful. This Court has repeatedly rejected that logically circular approach to jurisdictional statutes. *E.g.*, *ibid.*; *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 92 (1998).

Contrary to the lower courts' view (J.A. 15-18, 70-74), *AADC* does not limit Section 1252(g) to discretionary acts. While this Court described Section 1252(g) as "narrow" and "discretion-protecting," *AADC*, 525 U.S. at 487, the point was simply that Congress "ma[de] special provision for" three "stages in the deportation process" where "the Executive has discretion to abandon the endeavor," *id.* at 483. The Court nowhere suggested that a claim challenging the Executive's action at one of the three enumerated stages on non-discretionary grounds is somehow atextually exempt from Section 1252(g). To the contrary, *AADC* held that Section 1252(g) "squarely" applied to the selective-prosecution claim against commencing the removal proceedings there, even though the government of course lacked "discretion" to violate the First Amendment. *Id.* at 487.

3. The First Circuit further maintained that respondents are not challenging the government's "discrete actions" to execute their removal orders, but rather its policy of doing so without sufficient process. J.A. 18. But a challenge to the procedures used to take one of the three discrete actions shielded by Section 1252(g) is no less a "claim" that "arise[s] from" that action. The *AADC* plaintiffs could not evade Section 1252(g) by framing their claim as a challenge to the use of retaliatory procedures in selecting aliens for removal, and aliens likewise cannot challenge the execution of their removal orders by framing the claim as an objection that the procedures for selecting the country of removal fail to provide adequate notice (or fail to consider important factors or reliance interests under the APA).

For similar reasons, the First Circuit's reliance (J.A. 18) on *DHS* v. *Regents*, 591 U.S. 1 (2020), was misplaced. There, this Court held that Section 1252(g) did not preclude a challenge to the rescission of a program that offered certain substantive immigration benefits to certain deferred-action recipients. *Id.* at 19. The Court explained that the "rescission, which revokes a deferred action program with associated benefits, is not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order." *Ibid.* Unlike *Regents*, this case challenges not a distinct programmatic determination about who is eligible for an immigration benefit, but instead a policy that concerns *solely* the execution of final removal orders—specifically, the procedures for designating the country of removal.

The First Circuit fared no better in invoking (J.A. 18) *Jennings* v. *Rodriguez*, 583 U.S. 281 (2018). The plaintiffs there claimed that the INA implicitly required that aliens detained pending removal proceedings be

given periodic bond hearings. See *id.* at 290-291. Citing *AADC*, a plurality of this Court concluded that Section 1252(g) did not bar the claim, reasoning that bond hearings pending detention were "too remote from" the three covered actions and cautioning against interpreting the phrase "arising from" to "sweep in any claim that can technically be said" to be caused by one of those actions. *Id.* at 294, 295 n.3. No such remoteness is at issue here; determining the removal country is an essential element of executing a removal order, for it is impossible to remove an alien *from* the United States without deciding to remove him *to* a particular other country.

4. The First Circuit also asserted that, because a removal order must, by regulation, "'identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made,'" respondents' claim against third-country removals "does not arise from the decision or action to 'execute' that order," but instead "from the decision or action *not* to execute the country-designation aspect of the removal order." J.A. 16-17. That is incorrect. A removal order is simply an order "concluding that the alien is deportable or ordering deportation," see *Riley* v. *Bondi*, 606 U.S. 259, 267 (2025), and DHS has discretion in selecting the country of removal, see 8 U.S.C. 1231(b). The removal order expressly identifies potential removal countries *and* impliedly incorporates "the authority of [DHS] to remove the alien to any other country as permitted by [Section 1231(b)]." 8 C.F.R. 1240.12(d); see 8 C.F.R. 208.16(f), 1208.16(f). Removal to a third country is thus no less an execution of the removal order than removal to an identified country.

5. Finally, the First Circuit's fleeting reliance (J.A. 17 n.4) on a presumption of judicial review is misplaced. Determining the country of removal is an essential element of "the decision or action * * * [to] execute [a] removal order[]," and Congress emphatically barred review of "any" claim challenging such execution "notwithstanding any other provision of law (statutory or nonstatutory)." 8 U.S.C. 1252(g). That is "clear and convincing" language that "dislodge[s] the presumption." *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010); see *Doe*, 609 U.S. at 340.[4]

B. Section 1252(b)(9) Precludes Jurisdiction

The INA also more generally bars district-court jurisdiction here. It provides that "[j]udicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien * * * shall be available only in judicial review of a final order" of removal. 8 U.S.C. 1252(b)(9). Section 1252(b)(9) functions as an "unmistakable 'zipper' clause," *AADC*, 525 U.S. at 483, directing that "no court shall have jurisdiction" to review any "such questions" "[e]xcept as otherwise provided in this section," 8 U.S.C. 1252(b)(9)—*i.e.*, through "the sole and exclusive means" of "a petition for review filed with an appropriate court of appeals," 8 U.S.C. 1252(a)(5); see 8 U.S.C. 1252(a)(1).

Whether the government is following lawful procedures in removing aliens to third countries is plainly a

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[4] Although *AADC* makes clear that Section 1252(g) precludes review even of constitutional claims, this case, like *AADC*, does not require the Court to address "the possibility of a rare case in which the alleged basis of [unconstitutionality] is so outrageous" that review is somehow deemed available despite Section 1252(g). 525 U.S. at 491; cf. *NRC* v. *Texas*, 605 U.S. 665, 681-682 (2025); *Webster* v. *Doe*, 486 U.S. 592, 603 (1988).

"question[] of law and fact" "arising from" the government's "action[s] taken * * * to remove" those aliens. 8 U.S.C. 1252(b)(9). After all, respondents are "challenging the decision * * * to seek removal" to third countries without their preferred procedures. *Jennings*, 583 U.S. at 294 (plurality opinion). Review of that decision must occur—if anywhere—"only in judicial review of a final order under [Section 1252]." 8 U.S.C. 1252(b)(9).

The First Circuit deemed Section 1252(b)(9) inapplicable because "this is not a case that seeks review of an order of removal, the decision to seek removal, or the process by which removability is determined." J.A. 27. As a threshold matter, Section 1252(b)(9) is not limited to such actions; it encompasses claims arising from any action taken to remove an alien. To be sure, it does not extend to claims bearing only a "remote" connection to removal. *Jennings*, 583 U.S. at 295 n.3 (plurality opinion); see *ibid.* (detention without bond); *Regents*, 591 U.S. at 19 (recission of deferred action). But determining the country of removal is the essential last step in the decision to seek an actual removal. Accordingly, respondents' claims are covered by Section 1252(b)(9) on "even the narrowest reading" of the statute. Cf. *Jennings*, 583 U.S. at 295 n.3 (plurality opinion); *Doe*, 609 U.S. at 342-343 (rejecting similar attempt to limit meaning of "determination" in another judicial-review bar).

The district court additionally deemed Section 1252(b)(9) inapplicable on the ground that respondents' claims "cannot be 'raised efficaciously within the administrative proceedings delineated in the INA,'" because "an applicant is not entitled to have the agency adjudicate claims of relief that relate to a country that nobody is trying to send them to" at the time the removal order

is sought. J.A. 76-77 (quotation marks omitted); see J.A. 76-85. But those "functional" concerns (J.A. 76) cannot override the statute's plain text, which encompasses "*all* questions" that "aris[e] from" actions to remove aliens, 8 U.S.C. 1252(b)(9) (emphasis added)—not just the subset of those questions that are "efficaciously" (J.A. 76) reviewable in administrative proceedings. Cf. *Riley*, 606 U.S. at 272 ("These are legitimate practical concerns, but we must nevertheless follow the statutory text and our prior precedents.").

If that means Section 1252(b)(9) renders certain questions unreviewable, it would be like countless other judicial-review bars, *e.g.*, 8 U.S.C. 1231(a)(5) and (h), 1252(a)(2)(B) and (C), where Congress has trusted the Executive to be the final decisionmaker on certain issues. See *Doe*, 609 U.S. at 344-345. That policy choice is especially unobjectionable for challenges to the country of removal by aliens with concededly valid removal orders. "[C]ontrol over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature," *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982), and statutory withholding and CAT/FARRA are framed as obligations imposed on the government, not enforceable individual rights belonging to aliens, see pp. 31-33, 35-36, *infra*.

C. FARRA And The INA Further Preclude Jurisdiction Over Respondents' CAT-Related Claims

Respondents' CAT-related claims are additionally foreclosed by CAT-specific jurisdictional bars. Section 2242(d) of FARRA provides that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under [CAT] or this section, or any other determination made with respect to the application of the [CAT] policy," "except as part

of the review of a final order of removal." 112 Stat. 2681-822; see 8 C.F.R. 208.18(e), 1208.18(e). And the INA provides that "a petition for review filed with an appropriate court of appeals * * * shall be the sole and exclusive means for judicial review of any cause or claim under [CAT]." 8 U.S.C. 1252(a)(4).

Those provisions bar respondents' claim in district court that FARRA's implementing regulations require additional procedures for third-country removals, which is indisputably a claim "under" CAT. The provisions also bar respondents' district-court claim that due process requires additional procedures to comply with CAT. That too is a claim "under" CAT because FARRA supplies the only substantive liberty interest on which the asserted procedural right to due process could rest. See *Munaf* v. *Geren*, 553 U.S. 674, 692, 700-703 (2008); cf. *Sandin* v. *Conner*, 515 U.S. 472, 483-484 (1995).

The First Circuit deemed those provisions inapplicable on the ground that respondents' claims are brought "under" the APA, not CAT or FARRA. J.A. 22-24. But on that view, *no* claim would ever be barred by those provisions, because CAT is non-self-executing and FARRA creates no cause of action. Instead, a claim "under" CAT is one "subject to" or "governed by" CAT, see *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991), as are respondents' CAT-related claims raised via the APA. Furthermore, the APA requires invoking "the special statutory review proceeding relevant to the subject matter" if one exists, 5 U.S.C. 703, and a petition for review under Section 1252(a) is that proceeding in this context.

II. SECTION 1252(f)(1) PRECLUDES THE CLASSWIDE DECLARATORY RELIEF AND APA VACATUR

The INA bars jurisdiction to award the classwide relief imposed. It provides that lower federal courts lack "jurisdiction or authority to enjoin or restrain the operation" of certain INA provisions—including the removal provisions in 8 U.S.C. 1231—"other than with respect to the application of such provisions to an individual alien" in removal proceedings. 8 U.S.C. 1252(f)(1). By its plain terms, Section 1252(f)(1) thus prohibits lower federal courts from issuing classwide relief that "order[s] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Aleman Gonzalez*, 596 U.S. at 550-551. The final judgment below violates Section 1252(f)(1). It runs to "an entire class of aliens." *Id.* at 550-551. It concerns a covered provision, Section 1231(b). See *id.* at 549. And it "restrain[s]" the "operation" of Section 1231(b) by "check[ing]" the government's "efforts to enforce or implement" that provision, *id.* at 549-550, regardless of the ground on which it is based, see *id.* at 552-554.

The district court attempted to "end-run" Section 1252(f)(1) by reframing the relief as a series of classwide declarations and a universal vacatur. See *Mullin* v. *Al Otro Lado*, 609 U.S. 258, 281 (2026) (Thomas, J., concurring). But the declarations and vacatur here effectively "enjoin or restrain the operation" of third-country removals under Section 1231(b) because, in substance, they require "federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" such removals, *Aleman Gonzalez*, 596 U.S. at 550-551. Indeed, that is their sole purpose.

A. Section 1252(f)(1) Prohibits Coercive Declarations

The First Circuit held that Section 1252(f)(1) is categorically inapplicable to declaratory judgments. That holding lacks merit.

1. The First Circuit noted that Section 1252(f)'s "caption and text * * * reference only injunctions." J.A. 43. But Section 1252(f)(1) forbids lower courts "to enjoin *or restrain*" the covered provisions, 8 U.S.C. 1252(f)(1) (emphasis added), making clear that its sweep is broader than just injunctions. Respondents have argued (26A406 Stay Opp. 14) that "enjoin or restrain" is just a "common doublet" referring only to injunctions and temporary restraining orders. But *Aleman Gonzalez* analyzed each word separately, and it interpreted "restrain" to turn on an order's *effect*, not its *form*. 596 U.S. at 548-549. The doublet theory is further undermined by the very next paragraph in the statute, which provides that "no court shall enjoin the removal of any alien" except in specific circumstances, without including "or restrain." 8 U.S.C. 1252(f)(2).

2. The First Circuit "emphasized that a declaratory judgment is a 'milder remedy' than an injunction" because "it does not coerce a party, prohibit any future action, or 'set the stage for a finding of contempt.'" J.A. 43. But that wrongly treats all declaratory judgments the same. *Some* declaratory judgments are not coercive, such as those that clarify whether the plaintiff may act (or not act) in a certain way, *e.g.*, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 130 (2007) (patent licensee may seek declaration on patent's invalidity), or those that declare a policy unlawful but "in [their] agreed substance d[o] not contemplate injunctive relief," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 155 (1963) (government allowed to continue enforcing stat-

ute declared unconstitutional while appeal was pending). Such declarations do not "check, hold back, or prevent" the defendant, *Aleman Gonzalez*, 596 U.S. at 549, which remains "free to continue to" act as it likes, *Mendoza-Martinez*, 372 U.S. at 155.

But a declaration providing that the *defendant* must act (or not act) in a certain way and that contemplates a *follow-on injunction* to enforce compliance does check, hold back, and prevent the defendant, and thus has the practical effect of an injunction. That is the case here. The declaration states that all class members have an enforceable "right" to "meaningful notice" and "meaningful opportunity" to be heard before they can be removed to a third country. J.A. 152. It thus invites "every single member of the class" to "immediately seek an injunction grounded on the authority of the declaratory judgment," even before appellate proceedings have concluded, if the government does not immediately comply. *Alli* v. *Decker*, 650 F.3d 1007, 1020 n.2 (3d Cir. 2011) (Fuentes, J., dissenting). By intent and design, the judgment *restrains* application of the Guidance, *Aleman Gonzalez*, 596 U.S. at 549, because it has the "practical effect" of a "class-wide injunction," *Hamama* v. *Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018), cert. denied, 591 U.S. 1025 (2020); cf. *Abbott* v. *Perez*, 585 U.S. 579, 594 (2018).

Exempting a coercive declaration from Section 1252(f)(1) would invite the sort of evasion that the courts below committed. By prohibiting orders that "restrain" as well as "enjoin," Congress did not forbid classwide injunctions, yet welcome classwide declarations that invite each and every class member to obtain a follow-on injunction. A court may not accomplish in two steps (classwide declaration plus follow-on injunc-

tions) what Congress has forbidden it to do in one (class-wide injunction). Cf. *NRA* v. *Vullo*, 602 U.S. 175, 190 (2024) (government generally "cannot do indirectly what [it] is barred from doing directly").

It is not unusual to interpret a statutory reference to an "injunction" to cover similarly coercive relief, even if not labeled as such. For example, the Tax Injunction Act, which provides that district courts may "not enjoin, suspend[,] or restrain" the collection of state taxes in certain circumstances, 28 U.S.C. 1341, covers "declaratory judgment[s] holding state tax laws unconstitutional," which "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended." *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982). "If anything, § 1252(f)(1) more clearly forbids such declaratory relief than the Tax Injunction Act because it carried over nearly the exact words that *Grace Brethren Church* had already interpreted to preclude declaratory relief." *Al Otro Lado*, 609 U.S. at 282 (Thomas, J., concurring). As this Court has explained in another context, declaratory relief frequently can have "virtually the same practical impact as a formal injunction would"—especially where it "might serve as the basis for a subsequent injunction"—and therefore if "an injunction would be impermissible," "declaratory relief should ordinarily be denied as well." *Samuels* v. *Mackell*, 401 U.S. 66, 72-73 (1971).

The First Circuit viewed *Grace Brethren Church* as having "limited relevance because it involved federalism concerns." J.A. 44. That is a *non sequitur*. Whether a declaratory judgment has the practical effect of an injunction does not turn on whether the case implicates the separation of powers vertically rather than horizontally.

3. The First Circuit also drew a negative inference from Section 1252(e), which "prohibits courts from granting '*declaratory*, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien'" in certain circumstances. J.A. 43 (emphasis added). But a negative inference is inappropriate given the meaningful difference in language: Section 1252(e) prohibits entering "declaratory, injunctive, or *other equitable* relief," while Section 1252(f) precludes "jurisdiction or authority to enjoin *or restrain*." 8 U.S.C. 1252(e)(1)(A) and (f)(1) (emphases added). Section 1252(e) presumably enumerated "declaratory" relief because that modern remedial innovation by Congress (see *MedImmune*, 549 U.S. at 126), is not clearly encompassed within the phrase "equitable" relief, cf. *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999), though it is sometimes treated as such, see *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155 (1967). In contrast, Section 1252(f)(1)'s "or restrain" language clearly sweeps broadly enough to reach coercive declarations, especially in light of *Grace Brethren Church*.

B. Section 1252(f)(1) Prohibits The Vacatur Here

For essentially the same reasons, Section 1252(f)(1) also prohibits vacatur of the Guidance.[5] The First Circuit's contrary conclusion rested on the view that, compared to an injunction, vacatur is a "milder" and "less drastic" remedy that "neither compels nor restrains

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[5] The government maintains that the APA does not authorize universal vacatur at all. *E.g.*, Pet. at 11-24, *Department of Health and Human Services* v. *Texas Medical Association*, No. 26-491 (filed Oct. 14, 2026). But that objection is not jurisdictional. And this is an inappropriate case for the Court to resolve that significant remedial issue, given the multiple antecedent questions here.

further agency decision-making." J.A. 45-46; see J.A. 143-144 & n.102. Even accepting that characterization, however, vacatur plainly can still "check, hold back, or prevent" governmental action. *Aleman Gonzalez*, 596 U.S. at 549.

Most obviously, where a legislative rule provides the legal authority for officials to act, vacating the rule—*i.e.*, "depriving it of legal force or effect," see *United States* v. *Texas*, 599 U.S. 670, 690 (2023) (Gorsuch, J., concurring in the judgment)—necessarily "prevents" officials from acting by eliminating their authority to do so. And even where, as here, a policy statement or interpretive rule simply directs officials how to exercise their statutory and regulatory authority, vacatur "checks" and "holds back" officials from acting. As parties seeking such relief have themselves emphasized, without agency instructions about how to act, agency officials, "[a]s a practical matter," must "alter" their conduct at least to comply with the issuing court's rationale for the vacatur. See *id.* at 691. After all, failure to do so again raises the threat of follow-on injunctions.

III. THE GUIDANCE IS LAWFUL

In all events, respondents' claims fail on the merits. The Guidance ensures that, for third-country removals, an alien with a valid final order of removal will either be sent to a country where the United States has secured credible diplomatic assurances that removed aliens will not be persecuted or tortured, or be given notice and an opportunity to be heard regarding any fear he has regarding the country of removal. There is no basis in law to invalidate that policy, let alone to mandate the additional procedures judicially decreed below.

A. The Guidance Does Not Violate Section 1231(b)

The First Circuit held that Section 1231(b) requires the government to provide aliens "with effective notice and a meaningful opportunity to raise any fear-of-persecution claim before a third-country removal," and that the Guidance fails to do so. J.A. 30. The court presumably would demand what the district court mandated in its preliminary injunction under the same "meaningful" standard—10 days to raise a fear of removal and 15 days to challenge any adverse finding. See J.A. 285, 288. Regardless of the precise details, no such requirements exist under Section 1231(b).

1. By its terms, Section 1231(b) does not mandate any procedural requirements for assessing whether removal to a third country should be withheld based on a fear of persecution. To be sure, it forbids the government, subject to certain exceptions, from "remov[ing] an alien to a country *if the [government] decides* that the alien's life or freedom would be threatened in that country" on certain grounds. 8 U.S.C. 1231(b)(3)(A) (emphasis added). But Section 1231(b)(3) is generally silent on the procedures the government must employ in making withholding decisions, and there is no language imposing a notice-and-opportunity requirement of the type invented by the courts below.

When Congress entrusts an agency with "responsibility for substantive judgments," and does not specify the procedures for making that judgment, it presumptively also entrusts the agency with "the formulation of [such] procedures." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). While the Executive has adopted regulations governing withholding claims in various contexts, *e.g.*, 8 C.F.R. 208.16, 1208.16, none of them ad-

dresses the procedures for making withholding determinations in the context of third-country removals. Cf. J.A. 307 n.2. Thus, the Executive has discretion to fill that regulatory gap, which DHS exercised through the Guidance. See *FCC* v. *Brown*, No. 26A476 (Oct. 14, 2026) (per curiam), slip op. 3-4.

All the more so because Congress makes clear when it wishes to impose specific immigration procedures. See, *e.g.*, 8 U.S.C. 1225(b)(1)(B)(iii)(III) (requiring government to "provide by regulation" a hearing before an immigration judge for the "review" of certain "credible fear" determinations). But Section 1231 contains no such directive applicable here, let alone one resembling the procedures required by the courts below. Indeed, the First Circuit acknowledged that the procedural requirements it imposed appear nowhere in the statute's express text, and instead had to be "read[]" "into" the provision by "constru[ing]" Section 1231(b)(3) to "mean more than what [it] plainly say[s]." J.A. 33. That is sufficient basis to reverse under *Vermont Yankee*.

2. In fact, Section 1231 expressly disavows the creation of any judicially enforceable procedural requirements. Section 1231(h) unambiguously states: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. 1231(h). In construing Section 1231(b)(3) as creating certain implicit procedural rights, the First Circuit flouted that explicit prohibition.

The First Circuit resisted that straightforward reading of Section 1231(h), claiming that it would be anomalous for withholding-related questions not to be reviewable under the APA when they are reviewable under pe-

titions for review of final removal orders. J.A. 35. But Congress expressly treated petitions for review differently, by channeling all questions arising from entry of final removal orders into such a petition, see 8 U.S.C. 1252(a)(5) and (b)(9), and then making clear that this includes withholding claims, subject to certain limits, see 8 U.S.C. 1252(b)(4). By contrast, nothing in the APA's text specifically displaces Section 1231(h)'s general ban on private enforcement of Section 1231's provisions.

The First Circuit also cited *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), for the proposition that Section 1231(h) "does *not* bar [withholding] claims" like those here, J.A. 35. But there, aliens detained under Section 1231(a) sought their release, and this Court held that Section 1231(h) does not bar a "challenge [to] detention that is without statutory authority." *Zadvydas*, 533 U.S. at 688. That holding is inapposite because the aliens did not invoke any "right or benefit" allegedly created by Section 1231 in challenging their detention under the habeas statute; rather, the government raised Section 1231 as a *defense* to justify their continued confinement. By contrast, respondents' statutory claim rests on the premise that Section 1231(b) creates enforceable procedural rights. Put differently, if Section 1231 did not exist, respondents would have no claim, while the aliens in *Zadvydas* would have had an even stronger claim.

3. The First Circuit's sole textual defense of its position was to note that Section 1231(b)(3)(C) contains one reference to a "trier of fact." J.A. 31; see J.A. 106-107. From that, the court inferred that the statute "contemplates" that withholding claims would be adjudicated on an "individualized basis," where an alien would receive "effective notice and a meaningful opportunity" to make his case. J.A. 31.

But Section 1231(b)(3)(C)'s "oblique reference" to a trier of fact, see *Johnson* v. *Arteaga-Martinez*, 596 U.S. 573, 581 (2022), cannot bear such weight. The provision states that, "[i]n determining whether an alien has demonstrated" that he would be persecuted in a country, "the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in [8 U.S.C. 1158(b)(1)(B)(ii) and (iii)]." 8 U.S.C. 1231(b)(3)(C). The provision does not, however, mandate the use of a trier of fact in the first place.

Rather, the provision, which was adopted only in 2005, merely recognized that the Executive sometimes chooses to use a trier of fact under agency withholding procedures, and it regulated certain evidentiary determinations made by any such triers of fact. See H.R. Rep. No. 72, 109th Cong., 1st Sess. 165-167, 169 (2005). Again, when Congress wants to actually require an individualized hearing, it does so directly and clearly. See, *e.g.*, 8 U.S.C. 1225(b)(1)(B)(iii)(III). Moreover, where the Guidance does choose to use a trier of fact, it complies with Section 1231(b)(3)(C), because nothing in the Guidance prohibits an agency trier of fact from assessing corroboration or credibility in a manner different than under 8 U.S.C. 1158(b)(1)(B). J.A. 306-313.

4. The First Circuit also raised a functional argument, reasoning that the government could not effectively determine whether an alien will face persecution without giving him "prior notice of the intended removal destination and a meaningful opportunity to contest that destination." J.A. 34; see J.A. 108-109.

But as noted, that fails as a basic matter of administrative law. In the immigration-law context as elsewhere, the federal courts "are generally not free to im-

pose [additional procedural rights] if the agencies have not chosen to grant them." *Arteaga-Martinez*, 596 U.S. at 582 (brackets and quotation marks omitted). In all events, the First Circuit's criticisms fail on their own terms because the Guidance's procedures are more than adequate for the government to make the necessary determinations under Section 1231 (and CAT) for this class of aliens. See Part III.C, *infra*.

5. Ultimately, what drove the First Circuit's atextual holding was the perceived need to "avoid[] constitutional problems." J.A. 34. But statutes need not be construed "to eliminate all possible contentions that the statute *might* be unconstitutional" where, as here, there are no "*serious* constitutional doubts." See *Reno* v. *Flores*, 507 U.S. 292, 314 n.9 (1993); Part III.C, *infra*. And regardless, the avoidance canon is inapplicable for a more basic reason: "Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings*, 583 U.S. at 298. The constitutional-avoidance canon permits choosing "between competing *plausible* interpretations of a statutory text." *Ibid.* It is not a freestanding "license to graft" entirely new procedures onto a statute's existing text. *Ibid.*; accord *Arteaga-Martinez*, 596 U.S. at 581.

The First Circuit did just that. As in *Jennings*, "[n]othing" in Section 1231(b) "even remotely supports the imposition" of the procedures mandated below, 583 U.S. at 847—especially given Section 1231(h).

B. The Guidance Does Not Violate CAT, FARRA, Or The Implementing Regulations

1. CAT is a non-self-executing treaty in which the United States agreed not to remove aliens to countries where it determines they would face torture. See *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 530-531 (2021);

Medellín v. *Texas*, 552 U.S. 491, 520 (2008). FARRA is a statute in which Congress and the President recognized that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." § 2242(a), 112 Stat. 2681-822. To operationalize that general policy, FARRA tasks the Executive with promulgating "regulations to implement the obligations of the United States under [CAT]," § 2242(b), 112 Stat. 2681-822; see, *e.g.*, 8 C.F.R. 208.18, 1208.18—while barring judicial review of the Executive's determinations other than in a petition for review of a final removal order, see Part I.C, *supra*.

Like Section 1231(b), neither CAT nor FARRA addresses, let alone mandates, procedures for complying with the government's obligations in the context of third-country removals. CAT is non-self-executing, and FARRA's grant of rulemaking authority delegates procedural discretion to the Executive. The regulations likewise have nothing relevant to say in the specific context of third-country removals, because they do not set forth any process for evaluating CAT claims regarding those new countries. See, *e.g.*, 8 C.F.R 208.16(f), 208.17(b)(2), 1208.16(f), 1208.17(b)(2), 1240.12(d).

2. The First Circuit nevertheless decided to "read[]" the same notice-and-opportunity requirements that it read into Section 1231(b) "into the relevant statutory and regulatory provisions" of FARRA, for essentially the same meritless reasons. J.A. 38; see Part III.A, *supra*. In so doing, it went further than the district court, which candidly admitted that there was even "less direct, affirmative textual support" in FARRA than in Section 1231(b). J.A. 110.

The First Circuit also reasoned that because it read procedural requirements into Section 1231(b) for withholding claims, it must read the same requirements into FARRA for CAT claims, because they are each governed by the same set of regulatory provisions. J.A. 39. That rests on two illogical bootstraps. It incorrectly assumes the correctness of the court's holding as to Section 1231(b), using that to justify its reconstruction of FARRA and its regulations. And it lets a common set of *regulations* (for withholding and CAT) dictate the meaning of a *statute* (FARRA). In other words, even if the First Circuit were right about Section 1231, that would just mean the regulations are invalid as applied to withholding; that would not somehow justify judicially rewriting the regulations and then insisting that the same rewriting extends to FARRA, even though *that* statute clearly does not require any such thing.

Finally, the First Circuit suggested that FARRA's regulations require "*individualized* diplomatic assurances" about specific aliens. J.A. 32 n.14; see J.A. 126-130. That is incorrect. Under applicable regulations, the government may reject a CAT claim if it receives reliable "assurances" "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. 208.17(c), 1208.17(c). While the regulations mandate that an assurance must be "specific" to a single country and must apply to a claim raised by "an alien," nothing in the regulations requires a country's assurance to be alien-specific. *Ibid.* Should "the government of a specific country" give reliable "assurances" that *no alien* will be tortured in that country, that can be sufficient for the government to conclude that *any* "alien would not be tortured there if the alien were removed to that

country." *Ibid.* Moreover, the First Circuit's objection is inapplicable on its own terms to countries *without* assurances, where the Guidance provides for *individual* treatment of aliens.

C. The Guidance Does Not Violate Due Process

In all events, there is no merit to the constitutional concerns that drove the decisions below—neither as independent claims nor laundered through the avoidance canon. The Guidance guarantees that an alien will either be sent to a country where the United States has secured reliable assurances that aliens will not be tortured or persecuted, or be given notice and an opportunity to raise any fears he may have regarding his country of removal. J.A. 306-313. Due process requires nothing further—even assuming that aliens somehow can assert here a protected liberty interest in how the United States chooses to discharge its own obligations under Section 1231 and CAT, notwithstanding Sections 1231(h) and 1252(a)(4).

1. a. When the United States has obtained "credible" "assurances" from a foreign country that any "aliens removed from the United States will not be persecuted or tortured" upon removal to that country, J.A. 307, the Constitution requires no further process for aliens covered by those assurances. When the Executive credits such an assurance, that decision is conclusive, see *Munaf*, 553 U.S. at 702-703—at least absent express congressional authorization for courts to review whether the Executive complied with its own rules in making that decision, as in a petition for review from a final removal order, see *id.* at 703 n.6.

"[I]t is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf*,

553 U.S. at 700-701. When the Executive decides torture or persecution is not "likely to result" based on "foreign assurances it considers reliable," the "Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 702 (quotation marks omitted). Thus, in *Munaf*, this Court held that courts could not grant habeas relief to an American held abroad who objected that his transfer to "Iraqi custody is likely to result in torture," explaining that the Executive had determined otherwise and that the determination was conclusive. *Id.* at 700-703; see *Kiyemba* v. *Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (courts "may not question the Government's determination that a potential recipient country is not likely to torture a detainee"), cert. denied, 559 U.S. 1005 (2010).

This case follows "a fortiori." *Kiyemba*, 561 F.3d at 517 (Kavanaugh, J., concurring). *Munaf* involved the transfer of Americans, whereas this case concerns the transfer of aliens subject to final orders of removal. In both cases, the Judiciary lacks the expertise or authority to second-guess the Executive's determination. *Munaf*, 553 U.S. at 702. And if that determination suffices to defeat a *citizen's* due-process claim challenging his transfer to a given country, it necessarily suffices to defeat an *alien's*. See *Kiyemba*, 561 F.3d at 517-518 (Kavanaugh, J., concurring). All the more so where the determination is based on a specific intergovernmental communication—something whose credibility is especially the exclusive province of the Executive, not Judiciary, to evaluate. See *Biden* v. *Texas*, 597 U.S. 785, 805-806 (2022).

b. While the district court did not dispute that foreign assurances could sometimes be sufficient, it held that due process requires the Executive to make "an individualized determination that the foreign assurance[] [is] sufficient" in each alien's specific case, and that aliens are entitled to contest "the Government's reasons for crediting the assurances" of a given country. J.A. 129, 133 (brackets and quotation marks omitted); see J.A. 32 n. 15.

A federal court, however, may not "second-guess" the scope of the Executive's conclusion any more than its substance. See *Munaf*, 553 U.S. at 702-703; see also *Kiyemba*, 561 F.3d at 515; *id.* at 517-518 (Kavanaugh, J., concurring). The Judiciary is no better "suited" to question the "foreign policy" judgment that a foreign government's assurance is credible when it is categorical rather than individualized. *Munaf*, 553 U.S. at 702. Indeed, *Munaf* itself involved a general determination: There, the Executive credited that the Iraqis' "prison and detention facilities have generally met internationally accepted standards for basic prisoner needs." *Ibid.* (quotation marks omitted). None of that was prisoner-specific; it was not even specific to torture. If that is enough, then so too are the assurances at issue here—where a country is making a specific "diplomatic assurance[]" that "aliens removed from the United States will not be persecuted or tortured," J.A. 307.

The district court tried to distinguish *Munaf* on the ground that courts of appeals regularly review the denials of CAT or withholding claims on review of final removal orders, meaning that such determinations must be reviewable. See J.A. 135-136. That misses the point. Although compliance with Section 1231 and CAT is a matter for the political branches, Congress can, in at

least some circumstances, expressly authorize judicial review of the Executive's compliance with its own binding regulations in this area—as Section 1252 does through petitions for review of final removal orders. But the APA's general provisions do not authorize such review any more than the general habeas statute did in *Munaf*. 553 U.S. at 703 & n.6. Moreover, even in the petition-for-review context, the district court did not identify any case in which a CAT or withholding denial was reversed because a court second-guessed the Executive's acceptance of a foreign country's *assurances*—and it is far from clear that even Congress could authorize *that* scope of review in light of Executive primacy when communicating with foreign sovereigns.

The district court also doubted that any country is able to make a blanket assurance about how all aliens will be treated within their borders. See J.A. 129-130; see also J.A. 32 n.15. But again, that is not the district court's call to make. And at any rate, the court's skepticism is misplaced. Both persecution and torture require governmental involvement. See 8 C.F.R. 208.18(a)(1), 1208.18(a)(1); cf. *Matter of S-S-F-M-*, 29 I. & N. Dec. 207, 208-209 (Att'y Gen. 2025). A foreign government is capable of representing that such conduct will not occur under its watch, and the United States is entitled to credit that assurance.

More fundamentally, the district court's objections do not sound in *procedural* due process at all. They instead reflect the court's *substantive* view that a blanket assurance provides an insufficient basis for the government to categorically deem a given alien not likely to be persecuted or tortured. This Court has rightly rejected attempts to "recast in 'procedural due process' terms" what is really a challenge to the "'substantive'" criteria

the government has adopted. *Flores*, 507 U.S. at 308 (refuting similar argument for "individual[ized]" procedure). It makes no sense to require the government to provide additional process with respect to potential evidence that is immaterial under the relevant substantive standard. When the government is satisfied based on foreign assurances that no alien will be persecuted or tortured in the receiving country, the Due Process Clause does not further require a pointless "individualized determination." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself," and a plaintiff has no "right to demand needless formality.").

2. a. For aliens not subject to a countrywide assurance, the Guidance is also constitutional. Due process at most requires "notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In applying that standard, "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature." *Plasencia*, 459 U.S. at 34; accord *Demore* v. *Kim*, 538 U.S. 510, 521-522 (2003).

The Guidance easily satisfies any minimal requirements of due process in this context. It provides that aliens will receive personal notice of the proposed country of removal—which will be "read to the alien in a language he or she understands." J.A. 311. The Guidance thus guarantees actual notice to every affected alien. Cf. *Dusenbery* v. *United States*, 534 U.S. 161, 167-168 (2002). Moreover, once an alien receives notice, he is given a reasonable period of time to voice a fear of removal—generally 24 hours, or once given a "reasona-

ble means and opportunity to speak with an attorney prior to removal." J.A. 311. Should the alien affirmatively state such a fear, he is supplied "an opportunity to present [his] objections" to an asylum officer. *Mullane*, 339 U.S. at 313; see J.A. 312. DHS "will generally screen the alien within 24 hours of referral," and if it finds the alien has shown he "would more likely than not" be tortured or persecuted on removal, the alien will be referred to full administrative proceedings. *Ibid.* The Constitution does not require more.

b. The district court's objections lack merit.

The district court first insisted that 24 hours is too short a time for aliens to voice a fear of removal. See J.A. 125 n.86. But that timing is similar to the expedited-removal process this Court upheld against a due-process challenge in *DHS* v. *Thuraissigiam*, 591 U.S. 103 (2020). That process allows removal "without further hearing or review," 8 U.S.C. 1225(b)(1)(A)(i), subject only to a limited window to establish a "credible fear of persecution," *Thuraissigiam*, 591 U.S. at 109. And if an immigration officer determines the alien does not have a credible fear, the immigration judge's review is to be "concluded as expeditiously as possible" and "to the maximum extent practicable within 24 hours"—and "in no case later than 7 days after" the no-credible-fear determination. 8 U.S.C. 1225(b)(1)(B)(iii)(III). The expedited-removal statute does not limit the countries to which an alien can be removed under Section 1231(b), see 8 U.S.C. 1225(b)(1), so aliens processed for expedited removal who are to be removed somewhere other than their home country are subject to these same procedures for raising and assessing fear-of-persecution claims, see, *e.g.*, 8 U.S.C. 1231(b).

Neither the district court nor respondents have explained why those sorts of procedures are constitutionally adequate for expedited removal, but not here. If anything, the Guidance involves an even better case for expedition. The class comprises aliens who already have final orders of removal and have had a prior opportunity to raise withholding or CAT claims (and in many cases, have successfully done so); they are thus familiar with those modes of protection, and are generally able to raise them promptly if merited. Moreover, expedition is especially appropriate in the third-country context, where delays from additional review conflict with the speed often needed to effectively execute on arrangements with foreign countries. See, *e.g.*, C.A. Doc. 118413581, at 3-4. In fact, those countries are ones where an alien is particularly unlikely to have a viable claim of torture or persecution: both require extreme abuse, with the government's involvement, going well beyond ordinary violence or crime, see pp. 6-7, 42, *supra*, and aliens are unlikely to suffer *that type* of mistreatment in foreign countries where they lack prior connections.

The district court also objected to the fact that the Guidance requires an alien to show that it is "more likely than not" he is entitled to protection, because that standard is more demanding than what an alien must typically show during a credible-fear interview (at least a "significant possibility," 8 C.F.R. 208.30(e), 1208.30(e)). See J.A. 125 n.86. But the preponderance standard is the same standard that an alien ultimately must satisfy to obtain relief on the merits, see 8 C.F.R. 208.16(b) and (c)(2), 1208.16(b) and (c)(2), and it does not violate due process to require the alien to satisfy that standard under the record compiled during an initial review in order

to obtain further administrative proceedings that might involve an expanded record.

The district court also took issue with the Guidance's requiring an alien to "affirmatively state" a fear of removal and directing immigration officers "not" to "affirmatively ask whether the alien is afraid of being removed to the country of removal." J.A. 125 (emphasis omitted). But due process requires only an "opportunity" for the affected party to "present their objections." *Mullane*, 339 U.S. 314. It does not require the government to solicit those objections, or offer the full menu of options. Indeed, immigration law generally places the onus upon the alien. See, *e.g.*, 8 U.S.C. 1225(b)(1)(A)(ii).

That policy decision makes good sense. That aspect of the Guidance was adopted because DHS concluded that affirmatively asking an alien whether he feared removal would yield an excessive number of false-positive answers. See J.A. 307. The Biden Administration drew the same commonsense conclusion and adopted a similar practice in the expedited-removal context. 89 Fed. Reg. 48,710, 48,740, 48,743 (June 7, 2024). That reasonable judgment fits well within the discretion the Due Process Clause affords in the immigration space.

3. Finally, the lower courts' decision to augment the Guidance on a classwide basis is especially misguided because many class members have no due-process rights beyond what the political branches have chosen to provide with respect to executing their removal.

This Court has long held that the "due process rights of an alien seeking initial entry" are no greater than "[w]hatever the procedure[s] authorized by Congress." *Thuraissigiam*, 591 U.S. at 139. For aliens who have never been admitted—a group that includes the many

class members here who were ordered removed as inadmissible rather than deportable, see J.A. 247; see also *Blanche* v. *Lau*, 609 U.S. 1, 5 (2026)—"the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are* due process of law," *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892).

This Court has applied that principle beyond aliens stopped literally at the border. *Thuraissigiam*, 591 U.S. at 138-140. For instance, this Court has long employed the "entry fiction" that "aliens who arrive at ports of entry * * * are 'treated' for due process purposes 'as if stopped at the border,'" even for "those paroled elsewhere in the country for years pending removal." *Id.* at 139; see, *e.g.*, *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925).

Aliens who evade detection in crossing the border, and never receive sovereign permission to remain in the country, do not obtain greater rights than those stopped at the border in the first place. As this Court has observed, "the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law." *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 290 (1904). An alien "does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law." *Id.* at 292; accord *Carlson* v. *Landon*, 342 U.S. 524, 534 & n.18 (1952); cf. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724 (1893).

It would be perverse for an unlawful entrant who violates our laws and evades detection to receive better constitutional treatment than someone who presents at the border and is paroled into the country (perhaps even for decades). The Due Process Clause does not of-

fer such unjust enrichment to those who successfully breach this Nation's borders against our laws. Congress has reached a similar conclusion, deeming any alien present in the United States without admission to be an applicant for admission. See 8 U.S.C. 1225(a)(1). By contrast, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence," "his constitutional status changes accordingly." *Plasencia*, 459 U.S. at 32; accord *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950).

The district court tried to frame this Court's precedents as drawing a line not between aliens admitted and not admitted, but between aliens apprehended at the border and those who make it into the interior. See J.A. 115-117. That is unsound. In *Thuraissigiam*, after all, the alien made it past the border (albeit only by 25 yards). 591 U.S. at 138-140. So have parolees. See, *e.g.*, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 214-215 (1953). And Congress has imposed no geographic limit on when applicants for admission may be subject to expedited removal. 8 U.S.C. 1225(b)(1)(A)(iii) (authorizing government to apply expedited removal to any alien who has not been admitted or paroled and has not "been physically present in the United States continuously for the 2-year period immediately prior"). Mere physical presence in the Nation has never been the test. See, *e.g.*, *Nishimura Ekiu*, 142 U.S. at 660; see also, *e.g.*, *Rodriguez* v. *Vergara*, No. 26-50183 (5th Cir. Oct. 23, 2026) (en banc), slip op. 11-15.

Of course, once an alien is physically present within the United States, the Due Process Clause applies. See *Plyler* v. *Doe*, 457 U.S. 202, 215 (1982). But what due process requires, and whether it may be more than whatever the political branches have decided to provide,

turns on the governmental action at issue. Cf. *Kim*, 538 U.S. at 521-523. For illegal aliens who have final removal orders and were never admitted, due process does not license courts to superintend how the political branches execute their removal. See *Thuraissigiam*, 591 U.S. at 139; cf. *AADC*, 525 U.S. at 491-492; *Zadvydas*, 533 U.S. at 703-704 (Scalia, J., dissenting). The process due is whatever the political branches provide. Here, that is the Guidance.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * * .

2. 8 U.S.C. 1231 provides in pertinent part:

Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the

country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney

General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien—

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding 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 freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

* * * * *

(h) Statutory construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

3. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and ex-

cept as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under

the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph,

the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from

the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a)

of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) 11 See References in Text note below. of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or

nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically au-

thorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States

District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the ac-

tion, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(3) Certain actions

Paragraph (1) shall not apply to an action brought pursuant to section 1225(b)(3) of this title, subsections (e) or (f) of section 1226 of this title, or section 1231(a)(2)(B) of this title.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

4. Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-822, provides:

UNITED STATES POLICY WITH RESPECT TO THE INVOLUNTARY RETURN OF PERSONS IN DANGER OF SUBJECTION TO TORTURE.

(a) POLICY.—It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

(b) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(c) EXCLUSION OF CERTAIN ALIENS.—To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

(d) REVIEW AND CONSTRUCTION.—Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

(e) AUTHORITY TO DETAIN.—Nothing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act.

(f) DEFINITIONS.—

(1) CONVENTION DEFINED.—In this section, the term "Convention" means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

(2) SAME TERMS AS IN THE CONVENTION.—Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

5. 8 C.F.R. 208.16 provides:

Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) *Consideration of application for withholding of removal.* An asylum officer shall not determine whether an alien is eligible for withholding of the exclusion, deportation, or removal of the alien to a country where the alien's life or freedom would be threatened, except in the case of an alien who is determined to be an applicant for admission under section 235(b)(1) of the Act, who is found to have a credible fear of persecution or torture, whose case is subsequently retained by or referred to USCIS pursuant to the jurisdiction provided at § 208.2(a)(1)(ii) to consider the application for asylum, and whose application for asylum is not granted; or in the case of the spouse or child of such an alien who is included in the alien's asylum application and who files a separate application for asylum with USCIS that is not granted. In such cases, the asylum officer will determine, based on the record before USCIS, whether the applicant is eligible for statutory withholding of removal under paragraph (b) of this section or withholding or deferral of removal pursuant to the Convention Against Torture under paragraph (c) of this section. Even if the asylum officer determines that the applicant has established eligibility for withholding of removal under paragraph (b) or (c) of this section, the asylum officer shall proceed with referring the application to the immigration judge for a hearing pursuant to § 208.14(c)(1). In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a re-

quest for withholding of removal whether or not asylum is granted.

(b) *Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.* The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) *Past threat to life or freedom.* (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the cir-

cumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) *Future threat to life or freedom.* An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that

he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, un-

der the totality of the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including but not limited to persecutors who are gang members, public officials who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

(c) *Eligibility for withholding of removal under the Convention Against Torture.* (1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part

shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the adjudicator shall first determine whether the alien is more likely than not to be tortured in the country of removal. If 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 the Convention Against Torture, and the adjudicator shall determine whether protection under the Convention Against Torture should be granted either in the form of withholding of removal or in the form of deferral of removal. The adjudicator shall state that an alien eligible for such protection is eligible for withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraph (d)(2) or (3) of this section. If an alien eligible for such protection is subject to mandatory denial of withholding of removal under paragraph (d)(2) or (3) of this section, the adjudicator shall state that the alien is eligible for deferral of removal under § 208.17(a). For cases under the jurisdiction of USCIS pursuant to § 208.2(a)(1)(ii), the asylum officer may make such a determination based on the application and the record before USCIS; however, the asylum officer shall not issue an order granting either withholding of removal or deferral of removal because that is referred to the immigration judge pursuant to § 208.14(c)(1) and 8 CFR 1240.17.

(d) *Approval or denial of application*—(1) *General.* Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) *Mandatory denials*—(i) *In general.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the regulations issued pursuant to the legislation implementing the Convention Against Torture shall be denied if the applicant falls within sec-

tion 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(ii) *Public health emergencies.* If a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3, then an alien is ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien

(A) Exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate, or

(B) Has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, per guid-

ance issued by the Secretary or the Attorney General, as appropriate.

(iii) *Danger to the public health caused by an epidemic outside of the United States*. If, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly—

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States, and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in paragraph (d)(2)(ii)(A) of this section who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, including any relevant exceptions as appropriate, then—

(C) An alien or class of aliens are ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation

implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien or class of aliens are described in paragraph (d)(2)(ii)(A) of this section and are regarded as a danger to the security of the United States as provided for in paragraph (d)(2)(ii)(B) of this section.

(iv) The grounds for mandatory denial described in paragraphs (d)(2)(ii) and (iii) of this section shall not apply to an alien who is applying for asylum or withholding of removal in the United States upon return from Canada to the United States and pursuant to the Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries.

(3) *Exception to the prohibition on withholding of deportation in certain cases*. Section 243(h)(3) of the Act, as added by section 413 of Pub. L. 104-132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a

particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) [Reserved]

(f) *Removal to third country.* Nothing in this section or § 208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

6. 8 C.F.R. 208.17 provides:

Deferral of removal under the Convention Against Torture.

(a) *Grant of deferral of removal.* An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection. under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

(b) *Notice to alien.* (1) After an immigration judge orders an alien described in paragraph (a) of this section removed, the immigration judge shall inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The immigration judge shall inform the alien that deferral of removal:

(i) Does not confer upon the alien any lawful or permanent immigration status in the United States;

(ii) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;

(iii) Is effective only until terminated; and

(iv) Is subject to review and termination if the immigration judge determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

(2) The immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

(c) *Detention of an alien granted deferral of removal under this section*. Nothing in this section shall alter the authority of the Service to detain an alien whose removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter.

(d) *Termination of deferral of removal*. (1) At any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may file a motion with the Immigration Court having administrative control pursuant to § 3.11 of this chapter to schedule a hearing to consider whether

deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter.

(2) The Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of § 208.11 of this part.

(3) The immigration judge shall conduct a hearing and make a *de novo* determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the Service or the alien, as to whether the alien is more likely than not to be tortured in the country to which removal has been deferred. This determination shall be made under the

standards for eligibility set out in § 208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred.

(4) If the immigration judge determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the immigration judge determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the immigration judge's decision shall lie to the Board.

(e) *Termination at the request of the alien.* (1) At any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to § 3.11 of this chapter to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the immigration judge shall terminate the order of deferral and the alien may be removed.

(2) If necessary the immigration judge may calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the immigration judge determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the immigration judge determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

(f) *Termination pursuant to § 208.18(c)*. At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in § 208.18(c).

7. 8 C.F.R. 208.18 provides:

Implementation of the Convention Against Torture.

(a) *Definitions*. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity, alt-

hough a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(b) *Applicability of § § 208.16(c) and 208.17(a)-(1) Aliens in proceedings on or after March 22, 1999*. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a).

(2) *Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999*. An alien under a final order of deportation, exclusion, or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under § 208.16(c). Such motions shall be governed by § § 3.23 and 3.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless:

(i) The motion is filed within June 21, 1999; and

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under § § 208.16(c) or 208.17(a).

(3) *Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.* (i) Except as otherwise provided, after March 22, 1999, the Service will not:

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention

prohibits the removal of an alien to a particular country, or

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

(ii) For each alien who, on or before March 22, 1999, filed a request with the Service for protection under Article 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under § § 208.16(c) or 208.17(a), such an alien must file a motion to reopen with the immigration court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under §§ 208.16(c) or 208.17(a) shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 208.16(c) or deferral of removal under § 208.17(a) will be considered under § 208.31.

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 208.18(d) and 235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(4) *Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999*. Sections 208.16(c) and 208.17 (a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), in which case the alien will be considered to have

been granted deferral of removal under 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have been finally denied withholding of removal under § 208.16(c) and deferral of removal under § 208.17(a).

(c) *Diplomatic assurances against torture obtained by the Secretary of State*. (1) The 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.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(d) *Cases involving aliens ordered removed under section 235(c) of the Act*. With respect to an alien terrorist or other alien subject to administrative removal

under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of Part 208 relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply.

(e) *Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.* (1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.

8. 8 C.F.R. 1208.16 provides:

Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) *Consideration of application for withholding of removal.* Consideration of eligibility for statutory withholding of removal and protection under the Convention Against Torture by a DHS officer is as provided at 8 CFR 208.16. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) *Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.* The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) *Past threat to life or freedom.* (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum

officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) *Future threat to life or freedom.* An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his

or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

(i) In ceases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including persecutors who are gang members, public official who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

(c) *Eligibility for withholding of removal under the Convention Against Torture*. (1) For purposes of regulations under Title II of the Act, "Convention Against

Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 1208.17(a).

(d) *Approval or denial of application*—(1) *General.* Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) *Mandatory denials*—(i) *In general.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the regulations issued pursuant to the legislation implementing the Convention Against Torture shall be denied if the applicant falls within sec-

tion 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(ii) *Public health emergencies.* If a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3, then an alien is ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien—

(A) Exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate; or

(B) Has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, per guid-

ance issued by the Secretary or the Attorney General, as appropriate.

(iii) *Danger to the public health caused by an epidemic outside of the United States*. If, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly—

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in paragraph (d)(2)(iii)(A) of this section who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, including any relevant exceptions as appropriate, then—

(C) An alien or class of aliens are ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation

implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien or class of aliens are described in paragraph (d)(2)(iii)(A) of this section and are regarded as a danger to the security of the United States as provided for in paragraph (d)(2)(iii)(B) of this section.

(iv) The grounds for mandatory denial described in paragraphs (d)(2)(ii) and (iii) of this section shall not apply to an alien who is applying for asylum or withholding of removal in the United States upon return from Canada to the United States and pursuant to the Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries.

(e) [Reserved]

(f) *Removal to third country*. Nothing in this section or § 1208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

9. 8 C.F.R. 1208.17 provides:

Deferral of removal under the Convention Against Torture.

(a) *Grant of deferral of removal.* An alien who: has been ordered removed; has been found under § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under

§ 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

(b) *Notice to alien.* (1) After an immigration judge orders an alien described in paragraph (a) of this section removed, the immigration judge shall inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The immigration judge shall inform the alien that deferral of removal:

(i) Does not confer upon the alien any lawful or permanent immigration status in the United States;

(ii) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;

(iii) Is effective only until terminated; and

(iv) Is subject to review and termination if the immigration judge determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

(2) The immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

(c) *Detention of an alien granted deferral of removal under this section.* Nothing in this section shall alter the authority of the Service to detain an alien whose

removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter.

(d) *Termination of deferral of removal.* (1) At any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may file a motion with the Immigration Court having administrative control pursuant to § 1003.11 of this chapter to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter.

(2) The Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the

time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of § 1208.11 of this part.

(3) The immigration judge shall conduct a hearing and make a *de novo* determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the Service or the alien, as to whether the alien is more likely than not to be tortured in the country to which removal has been deferred. This determination shall be made under the standards for eligibility set out in § 1208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred.

(4) If the immigration judge determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the immigration judge determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the immigration judge's decision shall lie to the Board.

(e) *Termination at the request of the alien.* (1) At any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to § 1003.11 of this chapter to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the immigration

judge shall terminate the order of deferral and the alien may be removed.

(2) If necessary the immigration judge may calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the immigration judge determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the immigration judge determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

(f) *Termination pursuant to § 1208.18(c).* At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in § 1208.18(c).

10. 8 C.F.R. 1208.18 provides:

Implementation of the Convention Against Torture.

(a) *Definitions.* The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she

or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official

capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(b) *Applicability of §§ 1208.16(c) and 1208.17(a)*—(1) *Aliens in proceedings on or after March 22, 1999*. (i) An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, may apply for withholding of removal under § 1208.16(c), and, if applicable, may be considered for deferral of removal under § 1208.17(a).

(ii) In addition, an alien may apply for withholding of removal under 8 CFR 208.16(c), and, if applicable, may be considered for deferral of removal under 8 CFR 208.17(a), in the following situation: The alien is determined to be an applicant for admission under section 235(b)(1) of the Act, the alien is found to have a credible fear of persecution or torture, the alien's case is subsequently retained by or referred to USCIS pursuant to the jurisdiction provided at 8 CFR 208.2(a)(1)(ii) to consider the application for asylum, and that application for asylum is not granted.

(2) *Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999.* An alien under a final order of deportation, exclusion, or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under § 1208.16(c). Such motions shall be governed by §§ 1003.23 and 1003.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless:

(i) The motion is filed within June 21, 1999; and

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under §§ 1208.16(c) or 1208.17(a).

(3) *Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.* (i) Except as otherwise provided, after March 22, 1999, the Service will not:

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention prohibits the removal of an alien to a particular country, or

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

(ii) For each alien who, on or before March 22, 1999, filed a request with the Service for protection under Ar-

ticle 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under §§ 1208.16(c) or 1208.17(a), such an alien must file a motion to reopen with the immigration court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under §§ 1208.16(c) or 1208.17(a) shall not be subject to the requirements for reopening in §§ 1003.2 and 1003.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 1208.16(c) or deferral of removal under § 1208.17(a) will be considered under § 1208.31.

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 1208.18(d) and 1235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(4) *Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999*. Sections 208.16(c) and 208.17 (a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 1208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), in which case the alien will be considered to have been granted deferral of removal under 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have been finally denied withholding of removal under § 1208.16(c) and deferral of removal under § 1208.17(a).

(c) *Diplomatic assurances against torture obtained by the Secretary of State*. (1) The 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.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(d) *Cases involving aliens ordered removed under section 235(c) of the Act.* With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of Part 208 relating to consideration or review by an immigration judge, the Board of

Immigration Appeals, or an asylum officer shall not apply.

(e) *Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture*. (1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.

11. 8 C.F.R. 1240.12 provides:

Decision of the immigration judge.

(a) *Contents*. The decision of the immigration judge may be oral or written. The decision of the immigration judge shall include a finding as to inadmissibility or deportability. The formal enumeration of findings is not required. The decision shall also contain reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge.

(b) *Summary decision.* Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to § 1240.10(b) and the respondent does not make an application under § 1240.11, the alien is statutorily ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal.

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

(d) *Removal.* When a respondent is ordered removed from the United States, the immigration judge shall identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made, pursuant to the provisions of section 241(b) of the Act. In the event that the Department of Homeland Security is unable to remove the alien to the specified or alternative country or countries, the order of the immigration judge does not limit the authority of the Department of Homeland Security to remove the alien to any other country as permitted by section 241(b) of the Act.