Judge King
Magistrate Judge Fricke

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUBIN TEMAHAGARI,

Petitioner,

v.

PAMELA BONDI, Attorney General of the United States; KRISTI NOEM, Secretary, United States Department of Homeland Security; LAURA HERMOSILLO, Acting Seattle Field Office Director, United States Citizenship and Immigration Services; BRUCE SCOTT,[1] Warden of Immigration Detention Facility; and the United States Immigration and Customs Enforcement,

Respondents.

Case No. C25-2484-LK-TLF

FEDERAL RESPONDENTS' RETURN MEMORANDUM

INTRODUCTION

This Court should deny Petitioner Rubin Temahagari's Petition for a Writ of Habeas Corpus. Mr. Temahagari, a citizen of Democratic Republic of the Congo ("DRC"), seeks an order requiring Federal Respondents to immediately release him from custody and enjoining

[1] Bruce Scott is not a federal employee and is not represented by the undersigned in these proceedings. All other respondents, which are represented by the undersigned, are referred to as "Federal Respondents."

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1 Federal Respondents from removing him to a third country unless Federal Respondents afford
2 him certain process. For the reasons set forth in this memorandum, the Petition should be
3 denied.

4 ## II. STATEMENT OF FACTS

5 Temahagari, is a native and citizen of the DRC. Declaration of Arambula, ¶ 3. He is
6 currently detained at the Northwest ICE Processing Center ("NWIPC") under INA § 241 as an
7 alien with a final removal order. *Id.* at ¶ 52.

8 On February 21, 2013, the Petitioner entered the United States at New York as a refugee.
9 *Id.* at ¶ 4. On January 5, 2019, Petitioner was convicted in the United States District Court,
10 Western District of Washington, for the offense of Felon in Possession of a Firearm under
11 18 U.S.C. § 922(g)(1) and sentenced to 39 months in prison. *Id.* at ¶ 5. On June 1, 2021,
12 Petitioner was issued a Notice to Appear ("NTA") charging him as removable under
13 INA §§ 237(a)(2)(C) and 237(a)(2)(A)(iii) for his firearms violation. *Id.* at ¶ 7.

14 On February 26, 2022, Petitioner appeared for a bond hearing with counsel. *Id.* at ¶ 19.
15 The immigration judge denied bond, finding Petitioner a danger to the community. *Id.*
16 Petitioner appealed the bond order to the Board of Immigration Appeals ("BIA"), which the BIA
17 later dismissed. *Id.*

18 On April 13, 2022, the immigration judge issued a written decision denying his
19 applications for relief and ordering Petitioner removed to DRC. *Id.* at ¶ 21. The immigration
20 judge reserved the right to appeal for both parties. *Id.*

21 Petitioner appealed the immigration judge's decision to the BIA. *Id.* at ¶ 22. The appeal
22 was dismissed on September 19, 2022. *Id.* On appeal to the Ninth Circuit, the Court issued a
23 decision to remand the case to the BIA concerning an allegation in the NTA regarding
24 Petitioner's admission into the United States and, therefore, impacting the finding of

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1 removability by the immigration judge. *Id.* at ¶ 25. Petitioner's case was remanded to the
2 immigration judge for additional proceedings. *Id.* at ¶¶ 26-28.
3 Following the withdrawal of counsel, the Petitioner was considered to be a member of the
4 *Franco-Gonzalez v. Holder* class action litigation once Petitioner became unrepresented and
5 given his mental health history. *Id.* at ¶ 34. Following a hearing on October 17, 2025, with the
6 Petitioner's Qualified Representative ("QR"), the Petitioner was found removable as charged by
7 a Tacoma Immigration Judge. *Id.* at ¶ 42. The Petitioner then received an individual merits
8 hearing with the Immigration Judge who issued his removal order in April 2022. *Id.*
9 In a *Franco* bond hearing on October 24, 2025, the Immigration Judge denied bond,
10 finding that the Petitioner was a danger and flight risk. *Id.* at ¶ 44. Petitioner reserved the right
11 to appeal but did not file an appeal. *Id.*
12 On April 24, 2025, the immigration judge issued a written decision ordering Petitioner
13 removed to the DRC but granting deferral under the Convention Against Torture. *Id.* at ¶ 48.
14 The immigration judge reserved the right to appeal for both parties. *Id.* Neither party filed an
15 appeal. *Id.* Petitioner's removal order has since become administratively final. *Id.* at ¶ 52.
16 The Department is currently reviewing options for third country removal. *Id.* ¶¶ 49-50.
17 **REGULATORY BACKGROUND**
18 On March 30, 2025, DHS issued updated guidance on its policy for removals of aliens to
19 third countries. Exhibit A (the "March Guidance"). This guidance provides, among other things,
20 that aliens may be removed to a third country without notice if the United States has received
21 assurances from that country that aliens removed from the United States will not be persecuted
22 or tortured.
23 Thereafter, on July 9, 2025, ICE issued a memorandum updating agency officials on its
24 policy regarding third country removals following the Supreme Court's order in *Dep't of*

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Homeland Sec. v. D.V.D., ___ U.S. ___, 145 S. Ct. 2153 (2025), staying an injunction issued in a class action challenging the March Guidance. Exhibit B (the "July Guidance"). The memorandum states:

> Effective immediately, when seeking to remove an alien with a final order of removal—other than an expedited removal order under Section 235(b) of the Immigration and National Act (INA)—to an alternative country as identified in section 241(b)(1)(C) of the INA, ICE must adhere to Secretary of Homeland Security Kristi Noem's March 30, 2025 memorandum, *Guidance Regarding Third Country Removals*, as detailed below. A "third country" or "alternative country' refers to a country other than that specifically referenced in the order of removal.
>
> If the United States has received diplomatic assurances from the country of removal that aliens removed from the United States will not be persecuted or tortured, and if the Department of State believes those assurances to be credible, the alien may be removed without the need for further procedures. ICE will seek written confirmation from the Department of State that such diplomatic assurances were received and determined to be credible. HSI and ERO will be made aware of any such assurances. In all other cases, ICE must comply with the following procedures:
>
> - An ERO officer will serve on the alien the attached Notice of Removal. The notice includes the intended country of removal and will be read to the alien in a language he or she understands.
> - ERO will <u>not</u> affirmatively ask whether the alien is afraid of being removed to the country of removal.
> - ERO will generally wait at least 24 hours following service of the Notice of Removal before effectuating removal. In exigent circumstances, ERO may execute a removal order six (6) or more hours after service of the Notice of Removal as long as the alien is provided reasonable means and opportunity to speak with an attorney prior to removal.
>   - Any determination to execute a removal order under exigent circumstances less, than 24 hours following service of the Notice of Removal must be approved by the DHS General Counsel, or the Principal Legal Advisor where the DHS General Counsel is not available.
> - If the alien <u>does not</u> affirmatively state a fear of persecution or torture if removed to the country of removal listed on the Notice of Removal within 24 hours, ERO may proceed with removal to the country identified on the notice. ERO should check all systems for motions as close in time as possible to removal.
> - If the alien <u>does affirmatively state</u> a fear if removed to the country of removal listed on the Notice of Removal, ERO will refer the case to U.S. Citizenship and Immigration Services (USCIS) for a screening for eligibility for protection under section 241(b)(3) of the INA and the Convention Against Torture (CAT). USCIS

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will generally screen the alien within 24 hours of referral.

- USCIS will determine whether the alien would more likely than not be persecuted on a statutorily protected ground or tortured in the country of removal.
- If USCIS determines that the alien has not met this standard, the alien will be removed.
- If USCIS determines that the alien has met this standard and the alien was not previously in proceedings before the immigration court, USCIS will refer the matter to the immigration court for further proceedings. In cases where the alien was previously in proceedings before the immigration court, USCIS will notify the referring immigration officer of its finding, and the immigration officer will inform ICE. In such cases, ERO will alert their local Office of the Principal Legal Advisor (OPLA) Field Location to file a motion to reopen with the immigration court or the Board of Immigration Appeals, as appropriate, for further proceedings for the sole purpose of determining eligibility for protection under section 241(b)(3) of the INA and CAT for the country of removal. Alternatively, ICE may choose to designate another country for removal.

The policy also indicates that the "Supreme Court's stay of removal does not alter any decisions issued by any other courts as to individual aliens regarding the process that must be provided before removing that alien to a third country."

ARGUMENT[2]

I. The Petitioner has not demonstrated an entitlement to a release from custody pursuant to *Zadvydas*.

Relying on *Zadvydas v. Davis,* 533 U.S. 678 (2001), Petitioner contends that his detention is unlawful because he has been in custody for more than six months and there is no significant likelihood of removal in the foreseeable future. Dkt. # 1, pp. 7-8. This argument is unsound for a variety of reasons. First, and most importantly, the length of detention is primarily a concern under *Zadvydas* if detention is only for the purpose of "preventing flight." *Zadvydas*, 533 U.S. at 690. Under those circumstances, "where detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed." *Id.*

[2] Federal Respondents do not concede that the Court has subject matter jurisdiction on any basis aside from habeas jurisdiction itself.

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1 (cleaned up). However, the second justification—the detainee is considered to be a danger to the
2 community—"does not necessarily diminish in force over time." *Id.* at 690-91.
3 In this case, Petitioner has twice been found by an Immigration Judge to be not only a
4 flight risk but a danger to the community. Decl. of Arambula, ¶¶ 19, 44. The latter
5 determination, which was not appealed, was made only two months ago. The Petitioner does not
6 address at all in his Petition why these determinations may be disregarded entirely (as he has
7 done) or affect the constitutional analysis under *Zadvydas*.
8 Second, Petitioner has the initial burden of demonstrating that there is "good reason to
9 believe that there is no significant likelihood of removal in the reasonably foreseeable future."
10 *Zadvydas*, 533 U.S. at 701. While true that deferral of removal to the DRC has been granted,
11 Petitioner offers nothing concerning the prospects of removal to a third country in the reasonably
12 foreseeable future. Accordingly, Petitioner has failed to show that he is entitled to be released
13 from detention pursuant to *Zadvydas*.

14 **II. The Petitioner is not entitled to seek broad injunctive relief interfering with**
15 **the Executive Branch's authority to remove him to any third country in this court.**

16 The Petitioner also seeks injunctive relief prohibiting his removal to a third country
17 unless and until ICE follows certain judicially imposed constraints imposed by a preliminary
18 injunction in a class action in the District of Massachusetts.
19 While immediate physical release is not the only remedy available under the federal writ
20 of habeas corpus, Petitioner is still required to demonstrate an entitlement to a permanent
21 injunction under the relevant standards. First, it is not sufficient that Petitioner demonstrate a
22 likelihood of success on the merits. Rather, Petitioner must actually succeed on the merits. *See*
23 *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546, n.12 (1987). Additionally, he must
24 show that he has suffered an irreparable injury, that, considering the balance of hardships

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1 between the plaintiff and defendant, a remedy in equity is warranted; and that the public interest
2 would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange*, L.L.C., 547 U.S.
3 388, 391 (2006). Once a plaintiff or petitioner demonstrates an entitlement to prevail on the
4 merits and that his or her harm is irreparable, the final two factors, *i.e.*, assessing the harm to the
5 opposing party and weighing the public interest, merge when the Government is the opposing
6 party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The decision to grant or deny permanent
7 injunctive relief is an act of equitable discretion by a district court, reviewable on appeal for
8 abuse of discretion. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).
9 Under these standards, the Petition should be denied. As a member of the plaintiff class
10 in an ongoing class action in the District of Massachusetts, the Petitioner is bound by the results
11 in that Court and should not be permitted to individually prosecute the same claims here that he
12 is pursuing as a class member in that case. Because the preliminary injunction issued in that case
13 has been stayed by the U.S. Supreme Court, the Petitioner is, in effect, seeking relief from the
14 Supreme Court's order. This should not be permitted. Moreover, the Petitioner has not
15 demonstrated that he entitled to the injunctive relief he seeks here on the merits.
16
17 *i. As a member of the plaintiff class certified in D.V.D. v. DHS, Petitioner must obtain the relief he seeks in the District of Massachusetts*
18 Petitioner does not contest that it is within the authority of Federal Respondents to remove
19 him to any third country pursuant to 8 U.S.C. § 1231(b)(2)(E)(vii). Indeed, as the Ninth Circuit
20 has held, "[a]fter immigration court proceedings have ended, 'DHS retains the authority to remove
21 the alien to any other country authorized by the statute.'" *Ibarra-Perez v. United States*, 2025 WL
22 2461663, at *5 (9th Cir. Aug. 27, 2025) (*quoting Johnson v. Guzman Chavez*, 594 U.S. 523, 536
23 (2021)). Thus. "[i]f DHS is unable to remove the alien to the specified or alternative country or
24 countries, the order of the [IJ] does not limit the authority of [DHS] to remove the alien to any

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other country as permitted by [§ 1231(b)]." *Id.* (internal quotation omitted).

Petitioner contends that before this removal power can be exercised, Federal Respondents should be required to go through elaborate and detailed procedural steps and be subject to timelines that are different and in excess of those steps that DHS has determined are appropriate and sufficient. The injunction Petitioner seeks would require Federal Respondents to follow those additional steps and endure additional delays in exercising their authority to remove him, thereby prolonging the Petitioner's unlawful presence in the United States.

Petitioner's arguments for the due process protections to which he claims entitlement rely heavily on a preliminary injunction entered in a class action lawsuit certified in the District of Massachusetts, *D.V.D. v. DHS*, No. 25-cv-10676 (D. Mass.). Dkt. # 1, pp. 10-11. Indeed, Petitioner is unquestionably a member of the plaintiff class in *D.V.D.*[3]

In *D.V.D.*, three plaintiffs instituted a putative class action suit in the U.S. District Court for the District of Massachusetts challenging their third-country removals. *D.V.D. v. DHS*, No. 25-cv-10676 (D. Mass.). On March 28, 2025, that court entered a TRO enjoining DHS and others from "[r]emoving any individual subject to a final order of removal from the United States to a third country, *i.e.*, a country other than the country designated for removal in immigration proceedings" unless certain conditions were met. *D.V.D. v. U.S. Dep't of Homeland Sec.*, 2025 WL 942948, at *1 (D. Mass. Mar. 28, 2025). On April 18, 2025, the District Court in *D.V.D.* issued an order granting the plaintiffs' motions for class certification and a preliminary

[3] Specifically, the class in *D.V.D.* is defined as:

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

D.V.D. v. U.S. Dep't of Homeland Sec., 778 F. Supp. 3d 355, 378 (D. Mass. 2025).

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injunction. *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 394 (D. Mass. 2025). A class was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure without a provision for an opt out. *See id.* at 386. The preliminary injunction was national in effect and established certain procedures that DHS was required to follow before removing an alien with a final order of removal to a third country.

On May 21, 2025, the District Court issued an order containing the following summary and clarification of its Preliminary Injunction:

> All removals to third countries, *i.e.*, removal to a country other than the country or countries designated during immigration proceedings as the country of removal on the non-citizen's order of removal, *see* 8 U.S.C. § 1231(b)(1)(C), must be preceded by written notice to both the non-citizen and the non-citizen's counsel in a language the non-citizen can understand. Dkt. 64 at 46–47. Following notice, the individual must be given a meaningful opportunity, *and a minimum of ten days*, to raise a fear-based claim for CAT protection prior to removal. *See id.* If the non-citizen demonstrates "reasonable fear" of removal to the third country, Defendants must move to reopen the non-citizen's immigration proceedings. *Id.* If the non-citizen is not found to have demonstrated a "reasonable fear" of removal to the third country, Defendants must provide a meaningful opportunity, *and a minimum of fifteen days*, for the non-citizen to seek reopening of their immigration proceedings. *Id.*

D.V.D. v. U.S. Dep't of Homeland Sec., 2025 WL 1453640, at *1 (D. Mass. May 21, 2025) (emphasis added).

On June 23, 2025, the United States Supreme Court stayed the District of Massachusetts' preliminary injunction pending the disposition of the Government's appeal from the order in the First Circuit Court of Appeals. *Dep't of Homeland Sec. v. D.V.D.*, __ U.S. __, 145 S. Ct. 2153 (2025).[4]

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[4] As of the present day, the First Circuit has not decided the appeal. Also, later that same day, the District Court ordered that, notwithstanding the Supreme Court's stay, its remedial order granting relief to the eight individual class members DHS sought to remove to South Sudan remained in effect. Order, *D.V.D.* (Dkt. # 176). On the Government's subsequent motion to the Supreme Court for clarification of its prior order, the Supreme Court held that its prior order applied to the eight individual aliens, clearing the way for their removal to South Sudan. *Dep't of Homeland Sec. v. D. V. D.*, ___ U.S. ___, 145 S. Ct. 2627, 2629 (2025).

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1 Because the Supreme Court stayed the preliminary injunction issued by the District Court
2 in *D.V.D.*, thereby allowing USCIS' March Guidance to remain in effect, the preliminary relief
3 granted by the District Court in *D.V.D.*, and specifically the due process procedures to which
4 Petitioner claims to be entitled, do not apply. To the extent that the Petitioner seeks to compel
5 Federal Respondents to follow those same procedures here, because he is a *D.V.D.* class
6 member, he must instead seek such relief in the District of Massachusetts as he is bound by the
7 proceedings that have already occurred in that case. He is not entitled to a second bite of the
8 apple here. *See, e.g. Qasemi v. Kurzdorfer*, 2025 WL 2938607, at *6 (W.D.N.Y. Oct. 16, 2025);
9 *Sanchez v. Bondi*, 2025 WL 2550646, at *2 (D. Colo. Aug. 20, 2025) (petitioners' claims were
10 foreclosed from individual assertion based on *D.V.D.*'s class certification order); *Ghamelian v.*
11 *Baker*, 2025 WL 2049981, at *3 (D. Md. July 22, 2025), *reconsideration denied*, 2025 WL
12 2074155 (D. Md. July 23, 2025) ("In light of Plaintiff's apparent class membership, claims
13 relating to his potential third country removal are more appropriately resolved in the *D.V.D.* case
14 and will not be addressed in this Court.") (footnote omitted); *Tanha v. Warden*, 2025 WL
15 2062181, at *5 (D. Md. July 22, 2025) (matters pertaining to Petitioner's removal destination are
16 more properly addressed by the District of Massachusetts); *compare Nguyen v. Scott*, 2025 WL
17 2419288, at *25 (W.D. Wash. Aug. 21, 2025) (claim for stay of removal to third country on
18 ground that Administration's third country removal policy was unconstitutionally punitive was
19 not precluded by Supreme Court's stay in *D.V.D.* because that specific claim was not before the
20 district court in *D.V.D.*).
21 Accordingly, the Petitioner's efforts to secure his release by relying on the preliminary
22 injunction issued in *D.V.D.* should be rejected. The Supreme Court stayed that preliminary
23 injunction and, as a *D.V.D.* plaintiff class member, he is bound by the Supreme Court's ruling.
24 He may not circumvent an order of the Supreme Court by seeking the same relief individually

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1 here that the Supreme Court denied him as a plaintiff class member in *D.V.D.*

2 *ii. Petitioner should not be permitted to individually prosecute the same claims here as he is advancing as a member of the plaintiff class in D.V.D. v. U.S. Dep't of*
3 *Homeland Sec.*

4 As a member of the plaintiff class in *D.V.D.*, Petitioner must obtain his requested relief in
5 that case and should not be permitted to individually pursue the same claim here. First, as a
6 member of the plaintiff class in *D.V.D.*, he is bound by the proceedings in that case the same as
7 all other class members. The plaintiff class in *D.V.D.* sought an injunction precluding their
8 removals to third countries unless they were first afforded essentially the same process that
9 Petitioner asks the Court to order here. The Supreme Court's stay of the preliminary injunction
10 entered in that case is not only precedent, but the result is binding on Petitioner here by virtue of
11 his status as a member of the *D.V.D.* plaintiff class.[5]

12 Additionally, courts recognize that members of class action lawsuits should not be
13 permitted to bring separate actions where they seek to litigate individually issues that are at issue
14 in the class action. *See Wynn v. Vilsack*, 2021 WL 7501821, at *3 (M.D. Fla. Dec. 7, 2021)
15 (collecting cases) ("Multiple courts of appeal have approved the practice of staying a case, or
16 dismissing it without prejudice, on the ground that the plaintiff is a member of a parallel class
17 action.") (internal quotations omitted). This prevents class members from litigating the same
18 claims individually at the same time in different *fora*. *See Thompson v. Transamerica Life Ins.*
19

20 [5] This is true even though the two orders in *D.V.D* were entered on requests for interim relief. A grant of interim relief "squarely control[s]" like cases and binds lower courts as a matter of vertical *stare decisis*. *Trump v. Boyle*,
21 606 U. S. ___, 145 S. Ct. 2653, 2654 (2025). Even though a decision regarding interim relief is not necessarily "conclusive as to the merits," *id.* at 2654, its "'reasoning—its *ratio decidendi*'"—carries precedential weight, *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 606 U.S. ___, 145 S. Ct. 2658, 2663-64 (2025) (Gorsuch, J., and
22 Kavanaugh, J., concurring in part and dissenting in part) (quoting *Ramos v. Louisiana*, 590 U.S. 83, 104 (2020)). *See also Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) ("[J]ust as binding as [a] holding is the reasoning underlying
23 it."). "[E]ven probabilistic holdings—such as *California*'s top-line conclusion that 'the Government is likely to succeed in showing the District Court lacked jurisdiction to order the payment of money under the APA, must inform how a [lower] court proceeds in like cases." *Nat'l Insts. of Health*, 145 S. Ct. at 2664 (Gorsuch, J., and
24 Kavanaugh, J., concurring in part and dissenting in part) (internal citations omitted).

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1 *Co.*, 2020 WL 6145105, at *9 (C.D. Cal. Sept. 16, 2020). It also prevents class members from
2 avoiding the binding results of the class action. *See Goff v. Menke*, 672 F.2d 702, 704 (8th Cir.
3 1982).

4 This is also the rule in this Circuit. A district court may properly dismiss an individual
5 complaint where the plaintiff is a member in a class action, to the extent the individual action
6 duplicates the claims and seeks the same relief as the class action. *Pride v. Correa*, 719 F.3d
7 1130, 1133 (9th Cir. 2013) (discussing *Crawford v. Bell*, 599 F.2d 890, 892 (9th Cir. 1979)).
8 Such a dismissal is within the court's discretion based on its inherent power to control its own
9 docket. *Crawford*, 599 F.2d at 893. It is "imperative to avoid concurrent litigation in more than
10 one forum whenever consistent with the rights of the parties." *Id.*; *see Frost v. Symington*,
11 197 F.3d 348, 359 (9th Cir. 1999) ("To the extent that a class action involving the same issues
12 raised by [plaintiff] is currently pending . . . [he] may have to bring all of his related claims for
13 equitable relief . . . through . . . class counsel.").

14 This Court should decline to exercise jurisdiction over Petitioner's claims as a matter of
15 comity because the District of Massachusetts has certified a class action that includes the same
16 claims Petitioner is attempting to pursue here. *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d
17 93, 94-95 (9th Cir. 1982) ("There is a generally recognized doctrine of federal comity which
18 permits a district court to decline jurisdiction over an action when a complaint involving the
19 same parties and issues has already been filed in another district."). He must pursue relief as a
20 class member there and may not also simultaneously seek to pursue the same remedies here as an
21 individual.

22 **II. Petitioner is incorrect on the merits**

23 Those problems aside, Petitioner's Petition should be denied on the merits. To the extent
24 that Petitioner asserts that the policy of the DHS as reflected in the March 30 and July 9

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Guidance, if applied to Petitioner, would violate his rights to due process, Federal Respondents respectfully disagree. The Government's procedures for implementing the Convention Against Torture ("CAT"), *see* 8 U.S.C. § 1231 note, in this context are fully consistent with due process and, notwithstanding Petitioner's demands, a federal district court had no legal basis to order that those procedures be supplemented with ones that Petitioner would find more preferable.[6]

Petitioner is subject to a final order of removal. He has had an opportunity to raise a CAT claim in prior proceedings, may voice fears as to any potential countries of removal, and may move to reopen past proceedings as new fears arise. Indeed, Petitioner has already successfully obtained protection from removal to his home country of Afghanistan in withholding-only proceedings before an Immigration Judge.

The March and July DHS Guidance memoranda explain that the government provides aliens with additional process before removal to a third country. That process, as detailed below, ensures that an alien will only be sent to countries where the United States has received adequate assurance the alien will not be tortured, or that the alien will be given notice and an opportunity to be heard regarding any fear as to his country of removal.

1. The March Guidance provides that an alien may be removed to a "country [that] has provided diplomatic assurances that aliens removed from the United States will not be persecuted or tortured." If the State Department finds the country's assurances credible, "the alien may be removed without the need for further procedures."

The Constitution requires nothing further. Indeed, the Supreme Court has held that when the Executive determines a country will not torture a person on his removal, that is conclusive.

[6] Similarly, under FARRA, Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681–822 (1998) (codified as Note to 8 U.S.C. § 1231)), which codified CAT protections, an alien may not be removed to any country where they would be tortured.

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1 *Munaf v. Geren*, 553 U.S. 674, 702-703 (2008); *see Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C.
2 Cir. 2009) (federal courts "may not question the Government's determination that a potential
3 recipient country is not likely to torture a detainee"), *cert. denied*, 559 U.S. 1005 (2010). The
4 "*Munaf* decision applies here *a fortiori*: That case involved transfer of American citizens,
5 whereas this case involves transfer of alien detainees with no constitutional or statutory right to
6 enter the United States." *Kiyemba*, 561 F.3d at 517-518 (Kavanaugh, J., concurring). When the
7 Executive decides an alien will not be tortured abroad, courts may not "second-guess [that]
8 assessment," at least unless Congress has specifically authorized judicial review of that decision.
9 *Id.* at 517 (citation omitted); see *Munaf*, 553 U.S. at 703 n.6.
10 It is not necessary for the Executive Branch to make an individualized assessment to
11 satisfy due process. Indeed, federal courts may not "second-guess" the scope of the Executive's
12 conclusion any more than its substance. *See Kiyemba*, 561 F.3d at 517-518 (Kavanaugh, J.,
13 concurring). The decision that a foreign government's categorial assurance against torture is
14 sufficient to be accepted for all aliens is itself a "foreign policy" judgment the Judiciary "is not
15 suited" to question. *Munaf*, 553 U.S. at 702.
16 Relatedly, the objection to the government's reliance on a categorical assurance from a
17 foreign government does not sound in procedural due process at all. It is a substantive objection
18 that an assurance alone provides insufficient basis for the government to find that an alien is not
19 likely to be tortured. Attempts to "recast in 'procedural due process' terms" what is really a
20 challenge to the "'substantive'" criteria that the government has adopted have been rejected.
21 *Reno v. Flores*, 507 U.S. 292, 308 (1993) (rejecting similar argument for "individual[ized]"
22 procedure). For good reason: It makes no sense to require the Government to provide additional
23 process with respect to potential evidence that is immaterial under the substantive standard the
24 government has adopted. When the government is satisfied based on foreign assurances that no

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1 alien will be tortured in the receiving country, a further "individualized" assessment serves no
2 rational purpose.
3 **2.** For aliens being removed to a third country not covered by an adequate assurance,
4 the Guidance memoranda state that DHS will first inform the alien of removal to that country
5 and then give him an opportunity to affirmatively state that he fears removal there. If the alien
6 does so, immigration officials will generally screen the alien within 24 hours to determine
7 whether he "would more likely than not" be tortured if sent to that country. If not, the alien will
8 be removed; if so, the alien will be placed in further administrative proceedings—or if
9 appropriate, the government "may choose to designate another country for removal."
10 Petitioner apparently believes these procedures are also constitutionally inadequate. To
11 the contrary, they are entirely consistent with established immigration law. Most analogous, in
12 expedited-removal proceedings, aliens are expected to raise fears of removal "almost
13 immediately," and are often processed in a matter of hours. *See, e.g.*, 8 U.S.C.
14 § 1225(b)(1)(B)(i). If the asylum officer decides the alien does not have a credible fear, any
15 review by an immigration judge must be completed within seven days after that finding was
16 made. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(e). The expedited-removal statute
17 does not limit the countries to which an alien can be removed pursuant to Section 1231(b), *see*
18 8 U.S.C. § 1225(b), so its expedited procedures for raising and assessing fear claims apply even
19 when an alien is removed somewhere other than his home country, *see, e.g.*, 8 U.S.C.
20 § 1231(b)(1)(A)-(C) (listing alien's country of birth or citizenry as alternatives only where
21 removal to the country from which the alien arrived is unavailable).
22 **3.** The creation of the novel due-process requirements for which the Petitioner
23 advocates is particularly misguided here because in his case, the Due Process Clause requires no
24 more process than what the political branches provide. The Supreme Court has long held that

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1 "the due process rights of an alien seeking initial entry" are no greater than "[w]hatever the
2 procedure[s] authorized by Congress." *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103,
3 139 (2020) (citation omitted). For Petitioner, who has never been admitted "the decisions of
4 executive or administrative officers, acting within powers expressly conferred by Congress, *are*
5 due process of law." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (emphasis
6 added); *accord Thuraissigiam*, 591 U.S. at 138-40. To this end, the Supreme Court has also
7 long applied the so-called "entry fiction" that all "aliens who arrive at ports of entry ... are
8 treated for due process purposes as if stopped at the border." *Thuraissigiam*, 591 U.S. at 139
9 (citation omitted). Indeed, that is so "even [for] those paroled elsewhere in the country for years
10 pending removal." *Ibid.* The Court has applied the entry fiction to aliens with highly
11 sympathetic claims to having "entered" and developed significant ties to this country. *See, e.g.*,
12 *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (holding that a mentally disabled girl paroled into the
13 care of relatives for nine years must be "regarded as stopped at the boundary line" and "had
14 gained no foothold in the United States"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S.
15 206, 214-15 (1953) (holding that an alien with 25 years' of lawful presence who sought to
16 reenter enjoyed "no additional rights" beyond those granted by "legislative grace"). Compared
17 to these cases, it follows *a fortiori* that an unlawful entrant who violates our laws and evades
18 detection must, once found, be "treated as if stopped at the border." *Mezei*, 345 U.S. at 215.

19 Accordingly, the Supreme Court's precedents indicate that aliens who evade detection in
20 crossing the border should be treated the same as those who are stopped at the border in the first
21 place. *See Thuraissigiam*, 591 U.S. at 138-40. While aliens who have been admitted may claim
22 due-process protections beyond what Congress has provided, even when their legal status
23 changes (*e.g.*, an alien who overstays a visa, or is later determined to have been admitted in
24 error), *see Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950), the Supreme Court has

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1 never held that aliens who have "entered the country clandestinely" are entitled to such
2 additional rights, *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903). Put differently, "once
3 an alien gains admission to our country and begins to develop the ties that go with permanent
4 residence"—a status that, by definition, unlawful entrants are legally barred from obtaining—
5 "his constitutional status changes accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).
6 But before then, an alien who clandestinely enters "does not become one of the people to whom
7 these things are secured by our Constitution by an attempt to enter, forbidden by law." *United*
8 *States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904); *accord Wong Yang Sung*, 339 U.S.
9 at 49-50.

10 Congress has codified that distinction by treating all aliens who have not been admitted—
11 including unlawful entrants who evade detection for years—as "applicants for admission."
12 8 U.S.C. 1225(a)(1) ("An alien present in the United States who has not been admitted * * *
13 shall be deemed for purposes of [the INA] an applicant for admission."). That rule comports
14 with the Constitution. The Due Process Clause does not offer a windfall for those who
15 successfully circumvent our laws and evade detection. For constitutional purposes, it should not
16 matter whether an alien was apprehended "25 yards into U.S. territory" or 25 miles; nor should it
17 matter whether he was here unlawfully and evades detection for 25 minutes or 25 years.
18 *See Thuraissigiam*, 591 U.S. at 139. When an alien has never been admitted to this country by
19 immigration officers, his constitutional status for due-process objections to removal is no
20 different from an alien stopped at the border.

21 The Due Process Clause does not give such aliens a constitutional entitlement to any
22 extra removal procedures beyond what the political branches have provided. *See Thuraissigiam*,
23 591 U.S. at 138-40. But that is precisely what Petitioner is requesting. Again, the INA is silent
24 as to any specific process that aliens must be afforded under CAT before they are removed to a

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1 third country, and FARRA delegates that decision to the Executive Branch. *See* 8 U.S.C. § 1231
2 note. The March and July Guidance thus constitute the political branches' reasoned judgment as
3 to what that process should be in these circumstances, for aliens who have a final order of
4 removal. For aliens who were never admitted to the United States, the Executive's policies and
5 decisions made under FARRA "are due process of law." *Nishimura Ekiu*, 142 U.S. at 660
6 (emphasis added). And as detailed, far from some exercise of "arbitrary power," *Japanese*
7 *Immigrant*, 189 U.S. at 101, that Guidance is exceedingly reasonable, and provides aliens with
8 more than ample process to effectuate their responsible removal. The Constitution requires
9 nothing further.

10 **4.** The Petitioner puts forth no evidence that the exercise of Federal Respondents'
11 statutory authority to effect the Petitioner's removal to a third country is being exercised for
12 punitive reasons in his case. Petitioner makes no argument that the statute authorizing third
13 country removal is unconstitutional on its face. Thus, the Petitioner's burden is to prove that it is
14 being applied unconstitutionally to *him*, *i.e.*, that third country removal is being considered in his
15 case in order to punish him rather than simply as an exercise of the constitutional statutory power
16 granted to Federal Respondent by Congress.

17 Nothing in the Petition establishes that Federal Respondents are exercising their authority
18 in an unconstitutional manner in his case. Rather, Petitioner simply asserts that the Government
19 is engaging in "punitive removal practices" because he says so. The Court may not assume that
20 the Government is operating out of bad motives, nor may it impute these motives to Federal
21 Respondents here based on media accounts of how that authority may have been applied in other
22 cases.

23 Federal Respondents are entitled to a presumption of regularity. *Food & Drug Admin. v.*
24 *Wages & White Lion Invs., L.L.C.*, 604 U.S. 542 (2025). For the Petitioner to overcome that

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1 presumption, the Petitioner must come forward with evidence demonstrating that Federal
2 Respondents are attempting to remove him to a third country out of unconstitutional motives in
3 his individual case. Having failed to come forward with such evidence, Petitioner is not entitled
4 to obtain relief based on an unevidenced argument that Federal Respondents will be acting
5 unconstitutionally in effecting his removal to a third country.
6
7 **III. The Non-Merits Factors Likewise Support the Government, Not the Petitioner**

8 The remaining considerations favor Federal Respondents. The Petitioner has not
9 established irreparable harm that warrants extraordinary relief. The Court may not assume that
10 "the burden of removal alone ... constitute[s] the requisite irreparable injury." *Leiva-Perez v.*
11 *Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (quoting *Nken*, 556 U.S. at 435). Instead, a noncitizen
12 must show that there is a reason specific to his or her case, as opposed to a reason that would
13 apply equally well to all aliens and all cases, that removal would inflict irreparable harm. *Id.*
14 With respect to Petitioner's specific complaints, the Secretary of State already has the
15 authority to obtain "assurances" from a foreign country that an alien will not be tortured if
16 removed there, and those assurances are already dispositive with regard to CAT protection.
17 8 C.F.R. § 208.18(c). The Petitioner has not identified any sort of imminent or irreparable harm
18 from the Government's ability to obtain these assurances categorically versus one-by-one. Nor
19 could he: Because either decision would rest on the same basis (*i.e.*, that no alien will be
20 tortured), any requirement for an "individualized" determination would amount to a paperwork
21 demand. Likewise, before Petitioner can be removed to a country who has not provided
22 assurances, the March and July Guidance already provides for notice and an eminently
23 reasonable opportunity to raise a fear of removal. And the Petitioner cannot justify why the
24 added measures that he seeks—which, as noted, go well beyond the typical timeframe in

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1 expedited removal proceedings—are necessary to forestall irreparable harm here.

2 By contrast, as underscored by the Supreme Court's recent trio of stays in similar cases
3 involving immigration policy, the government suffers irreparable harm when the Executive
4 Branch is barred from implementing its immigration policies. *See Noem v. Nat'l TPS All.*,
5 ___ U.S. ___, 145 S. Ct. 2728, 221 L. Ed. 2d 981 (2025); *Noem v. Doe*, 145 S. Ct. 1524 (2025);
6 *D.V.D.*, 2025 WL 1732103. The government suffers an irreparable sovereign harm whenever its
7 policy is blocked by a court order. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J.,
8 in chambers); *cf. Trump v. CASA, Inc.*, 2025 WL 1773631, at *24 (holding that the Executive
9 Branch is irreparably harmed by an injunction that exceeds a district court's power and
10 improperly intrudes on executive prerogatives). That harm is even more acute in the
11 immigration context, where the Constitution assigns preeminent power to the political branches.
12 *See Galvan v. Press*, 347 U.S. 522, 531 (1954).

13 Moreover, the practical consequences of the injunction sought by the Petitioner only
14 underscore why the Constitution assigns immigration policy to the political branches. The
15 injunction would afford the Petitioner at least 25 days' worth of delay if he decides to voice a
16 fear under CAT—regardless of how frivolous his claim. Because ICE often has only a short
17 window to remove an alien—including because travel documents are not valid indefinitely— this
18 unfounded delay can scuttle an alien's entire removal process, forcing ICE to start anew. And
19 because ICE has both limited legal authority and practical ability to detain him, the result may be
20 that the Petitioner indefinitely perpetuates his unlawful presence in the United States while it
21 restarts removal.

22 Nor are these costs in service of any public benefit. The United States relies on third
23 countries to facilitate the removal of aliens who are difficult to otherwise remove. Absent an
24 effective third-country removal policy, the United States is forced to retain (and often, release)

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1 aliens into the community, some of whom may pose a danger. The public is not served by an
2 injunction that hollows the efficacy of this policy. *See Nken*, 556 U.S. at 436 (recognizing the
3 "public interest in prompt execution of removal orders").

4 **CONCLUSION**

5 For the foregoing reasons, Federal Respondents respectfully requests that this Court deny
6 the Petition.

7 **CERTIFICATION**

8 I certify that this memorandum contains 6,896 words, in compliance with Local Civil
9 Rule LCR 7(e)(2).

10 DATED this 22nd day of December, 2025.

11 Respectfully submitted,

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13

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