Judge Robart

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

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| HUMBERTO JIMENEZ-PEREZ,<br><br>Petitioner,<br>v.<br><br>PAMELA BONDI, Attorney General of the United States; KRISTI NOEM, Secretary, United States Department of Homeland Security; TODD LYONS, Acting Director for the U.S. Immigration and Customs Enforcement (ICE); LAURA HERMOSILLO, Seattle Field Office Director, U.S. Immigration and Customs Enforcement; BRUCE SCOTT[1], Warden of Immigration Detention Facility; and the UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,<br><br>Respondents. | Case No. C25-2631JLR<br><br>**FEDERAL RESPONDENTS' RETURN MEMORANDUM**<br><br>Noted for Consideration:<br>February 11, 2026 |

Pursuant to this Court's Order, Federal Respondents submit the following factual background as contained in the records of Petitioner Humberto Jimenez-Perez's immigration case, as well as relevant authority.

[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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## A. REGULATORY BACKGROUND

1. Detention Authority

The Immigration and Nationality Act ("INA") governs the detention and release of noncitizens during and following their removal proceedings. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 527-29 (2021). The general detention periods are generally referred to as "pre-order" (meaning before the entry of a final order of removal) and "post-order" (meaning after the entry of a final order of removal). Compare 8 U.S.C. § 1226 (authorizing pre-order detention) with § 1231(a) (authorizing post-order detention).

When a final order of removal has been entered, a noncitizen enters a 90-day "removal period." 8 U.S.C. § 1231(a)(1). Congress has directed that the Secretary of Homeland Security "shall remove the [noncitizen] from the United States." *Id.* To ensure a noncitizen's presence for removal and to protect the community from noncitizens who may present a danger, Congress mandated detention during the "removal period," which is the 90-day period following the issuance of a final order of removal. 8 U.S.C. § 1231(a)(2).

Section 1231(a)(6) authorizes Immigration and Customs Enforcement ("ICE") to continue detention of noncitizens after the expiration of the removal period. Unlike Section 1231(a)(2), Section 1231(a)(6) does not mandate detention and does not place any temporal limit on the length of detention under that provision:

> [A noncitizen] ordered removed who is inadmissible under section 1182, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [the Secretary of Homeland Security] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6) (emphasis added).

During the removal period, ICE is charged with attempting to effectuate removal of a noncitizen from the United States. 8 U.S.C. § 1231(a)(1). Although there is no statutory time



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limit on detention pursuant to Section 1231(a)(6), the Supreme Court has held that a noncitizen may be detained only "for a period reasonably necessary to bring about that [noncitizen's] removal from the United States." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The Supreme Court has further identified six months as a presumptively reasonable time necessary to bring about a noncitizen's removal. *Id.* at 701.

2. Third Country Removal Authority

Pursuant to 8 U.S.C. § 1231(b)(2)(E)(vii), Federal Respondents are statutorily authorized to remove deportable persons to third countries if the conditions of the statute are met.[2] Indeed, as the Ninth Circuit has held, "[a]fter immigration court proceedings have ended, 'DHS retains the authority to remove the alien to any other country authorized by the statute.'" *Ibarra-Perez v. United States*, 2025 WL 2461663, at *5 (9th Cir. Aug. 27, 2025) (*quoting Johnson v. Guzman Chavez*, 594 U.S. 523, 536 (2021)).

On March 30, 2025, DHS issued updated guidance (the "March Guidance") on its policy for removals of aliens to third countries. Declaration of Kipnis, Exhibit A. This guidance provides, among other things, that aliens may be removed to a third country without notice if the United States has received assurances from that country that aliens removed from the United States will not be persecuted or tortured. *Id.*

Thereafter, on July 9, 2025, ICE issued a memorandum updating agency officials on its policy regarding third country removals following the Supreme Court's order in *Dep't of Homeland Sec. v. D.V.D.*, ___ U.S. ___, 145 S. Ct. 2153 (2025), staying an injunction issued in a

[2] 8 U.S.C. § 1231(b)(2)(E) provides, in pertinent part:

> 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:
>
> ***
>
> (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.



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class action challenging the March Guidance.[3] Declaration of Kipnis, Exhibit B. 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

[3] The *D.V.D.* case is discussed extensively in this memorandum, *infra,* at pp. 8-13.



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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 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." *Id.*

## B. STATEMENT OF FACTS

Petitioner is a native and citizen of Cuba. Declaration of Reed, ¶ 3. Petitioner entered the United States in May 1980 with the Mariel Boatlift and was paroled into the United States. *Id.* at ¶ 4. Thereafter, between 1980 and 1983, he was convicted of a series of criminal offenses including burglary, robbery, and possession of controlled substances. *Id.* at ¶¶ 5-7; Declaration of Kipnis, Exhibit C (I-213).

In 1997, the Petitioner's parole was revoked and he was taken into custody by the former Immigration and Naturalization Service ("INS"). *Id.* at ¶ 8. Thereafter, a Notice to Appear ("NTA") was issued by the INS charging the Petitioner with numerous violations of the Immigration and Naturalization Act. *Id.* at ¶ 9; Declaration of Kipnis, Exhibit D (NTA).



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On February 19, 1998, the Petitioner was ordered removed from the United States to Switzerland and if Switzerland was unwilling to take Petitioner, then Cuba. *Id.* at ¶ 10; Exhibit E.

On August 10, 1998, Petitioner was released from detention pursuant to an Order of Supervision. *Id.* at ¶ 11. Thereafter, on June 15, 1999, Petitioner was convicted in Los Angeles County Superior Court of making Terrorist Threats in violation of Section 422 of the California Penal Code and sentenced to serve 25 years to life in prison. *Id.* at ¶ 12.

On June 10, 2025, upon the Petitioner's release from custody by California authorities, ICE took the Petitioner into custody pursuant to Section 241 of the INA, 8 U.S.C. § 1231. *Id.* at ¶¶ 16, 20.

Petitioner claims fear of being removed to either Switzerland or Cuba and is presently refusing to assist in the process of obtaining travel documents for purpose of effectuating his removal. *Id.* at ¶¶ 16, 18.[4]

Nothing in the Petition establishes that Petitioner is imminently subject to removal to a third country.

## C. ARGUMENT

### I. PETITIONER IS NOT ENTITLED TO INJUNCTIVE RELIEF INTERFERING WITH THE EXECUTIVE BRANCH'S STATUTORY AUTHORITY TO REMOVE HIM TO A THIRD COUNTRY

The Petitioner seeks injunctive relief prohibiting his removal to a third country.[5] Accordingly, Petitioner is required to demonstrate his entitlement to a permanent injunction

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[4] The Petitioner's unevidenced allegation that Federal Respondent did not follow proper procedure in re-detaining him, dkt. # 9 at ¶¶ 108-112, is rebutted by the Declaration of Reed. *Id.* at ¶¶ 15-17.

[5] Federal Respondents do not concede that the Court has subject matter jurisdiction on any basis aside from habeas jurisdiction itself. Notably, the Administrative Procedure Act, 5 U.S.C. §§ 701-706 does not apply in habeas proceedings. *See Trump v. J. G. G.*, 604 U.S. 670, 674 (2025) (Kavanaugh, J. concurring) ("Especially given the history and precedent of using habeas corpus to review transfer claims, and given 5 U.S.C. § 704, which states that claims under the APA are not available when there is another 'adequate remedy in a court,' I agree with the Court that habeas corpus, not the APA, is the proper vehicle here.").



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under the relevant standards. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). It is not sufficient that Petitioner demonstrates merely a likelihood of success on the merits. Rather, Petitioner must actually succeed on the merits. *See Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546, n.12 (1987). Additionally, he must show that he has suffered an irreparable injury, that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange*, L.L.C., 547 U.S. 388, 391 (2006). Once a plaintiff or petitioner demonstrates an entitlement to prevail on the merits and that his or her harm is irreparable, the final two factors, *i.e.,* assessing the harm to the opposing party and weighing the public interest, merge when the Government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The decision to grant or deny permanent injunctive relief is an act of equitable discretion by a district court, reviewable on appeal for abuse of discretion. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

Under these standards, the Petitioner's request for injunctive relief should be denied. As a member of the plaintiff class in an ongoing class action in the District of Massachusetts, the Petitioner is bound by the results in that Court and should not be permitted to individually prosecute the same claims here that he is pursuing as a class member in that case. Because the preliminary injunction issued in that case has been stayed by the U.S. Supreme Court, the Petitioner is, in effect, seeking relief from the Supreme Court's order. This is not jurisdictionally permissible as this Court lacks authority to countermand an order of the Supreme Court. Moreover, the Petitioner has not demonstrated that he is entitled to the injunctive relief he seeks on the merits. The Petitioner has not established that Federal Respondent's statutory authority to remove him to a third country is either unconstitutional on its face or as applied to him. Accordingly, insofar as the Petitioner seeks an injunction barring his removal to a third country



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entirely, or under certain circumstances, the Petition should be denied.

*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*

Petitioner does not contest that it is within the authority of Federal Respondents to remove him to any third country pursuant to 8 U.S.C. § 1231(b)(2)(E)(vii). Petitioner instead apparently 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 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 rely on, *inter alia,* 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. # 9, ¶¶ 93-95. Indeed, Petitioner is a member of the plaintiff class in *D.V.D.*[6]

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.*,

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[6] 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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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 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). The relief request by Petitioner here generally matches the relief preliminarily granted in *D.V.D.* See Dkt. # 9, p. 27, ¶¶ D, E.

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



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(2025).[7]

Because the Supreme Court stayed the preliminary injunction issued by the District Court in *D.V.D.*, thereby allowing USCIS' March Guidance to remain in effect, the preliminary relief granted by the District Court in *D.V.D.*, and specifically the due process procedures to which Petitioner claims to be entitled, do not apply. To the extent that the Petitioner seeks to compel Federal Respondents to follow those same procedures here, because he is a *D.V.D.* class member, he must instead seek such relief in the District of Massachusetts as he is bound by the proceedings that have already occurred in that case. He is not entitled to a second bite of the apple here. *See, e.g. Qasemi v. Kurzdorfer*, 2025 WL 2938607, at *6 (W.D.N.Y. Oct. 16, 2025); *Sanchez v. Bondi,* 2025 WL 2550646, at *2 (D. Colo. Aug. 20, 2025) (petitioners' claims were foreclosed from individual assertion based on *D.V.D.*'s class certification order); *Ghamelian v. Baker*, 2025 WL 2049981, at *3 (D. Md. July 22, 2025), *reconsideration denied*, 2025 WL 2074155 (D. Md. July 23, 2025) ("In light of Plaintiff's apparent class membership, claims relating to his potential third country removal are more appropriately resolved in the *D.V.D.* case and will not be addressed in this Court.") (footnote omitted); *Tanha v. Warden*, 2025 WL 2062181, at *5 (D. Md. July 22, 2025) (matters pertaining to Petitioner's removal destination are more properly addressed by the District of Massachusetts); *cf. Nguyen v. Scott*, 2025 WL 2419288, at *25 (W.D. Wash. Aug. 21, 2025).

Accordingly, insofar as the Petitioner seeks an injunction barring his removal to a third country by relying on the preliminary injunction issued in *D.V.D.*, his argument should be rejected. The Supreme Court stayed that preliminary injunction and, as a *D.V.D.* plaintiff class

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[7] 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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member, he is bound by the Supreme Court's ruling. He may not circumvent an order of the Supreme Court by seeking the same relief individually here that the Supreme Court denied him as a plaintiff class member in *D.V.D.*[8]

*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 Homeland Sec.*

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

Additionally, courts recognize that members of class action lawsuits should not be permitted to bring separate actions where they seek to litigate individually issues that are at issue in the class action. *See Wynn v. Vilsack*, 2021 WL 7501821, at *3 (M.D. Fla. Dec. 7, 2021) (collecting cases) ("Multiple courts of appeal have approved the practice of staying a case, or

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[8] The Court's decision to stay the preliminary injunction in *D.V.D.* also casts considerable doubt on the correctness of the decision in *Aden v. Nielsen*, 409 F.Supp.3d 998, 1019 (W.D. Wash. 2019).

[9] 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*, ___ 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 Institutes of Health v. Am. Pub. Health Ass'n*, ___ U.S. ___, 145 S. Ct. 2658, 2663-2664 (2025) (Gorsuch, J., and 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 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.'" 2025 WL 2415669, at *4 (Gorsuch, J., and Kavanaugh, J., concurring in part and dissenting in part) (internal citations omitted).



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dismissing it without prejudice, on the ground that the plaintiff is a member of a parallel class action.") (internal quotations omitted). This prevents class members from litigating the same claims individually at the same time in different *fora*. *See Thompson v. Transamerica Life Ins. Co.*, 2020 WL 6145105, at *9 (C.D. Cal. Sept. 16, 2020). It also prevents class members from avoiding the binding results of the class action. *See Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982).

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

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



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remedies here as an individual.

*iii. The Petitioner's application for an order barring his removal to a third country should be denied on the merits.*

Those problems aside, the Petitioner's application for an order barring his removal to a third country should be denied on the merits. To the extent that Petitioner asserts that the policy of DHS as reflected in the March 30 and July 9 memoranda, 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.[10]

Petitioner is subject to a final order of removal. He has had an opportunity voice fears as to any potential countries of removal and has done so. Declaration of Reed, ¶ 16. He may also move to reopen past proceedings as new fears arise.

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

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[10] 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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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. *Munaf v. Geren*, 553 U.S. 674, 702-703 (2008); *see Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (federal 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). The "*Munaf* decision applies here *a fortiori*: That case involved transfer of American citizens, whereas this case involves transfer of alien detainees with no constitutional or statutory right to enter the United States." *Kiyemba*, 561 F.3d at 517-518 (Kavanaugh, J., concurring). When the Executive decides an alien will not be tortured abroad, courts may not "second-guess [that] assessment," at least unless Congress has specifically authorized judicial review of that decision. *Id.* at 517 (citation omitted); *see Munaf*, 553 U.S. at 703 n.6.

It is not necessary for the Executive Branch to make an individualized assessment to satisfy due process. Indeed, federal courts may not "second-guess" the scope of the Executive's conclusion any more than its substance. *See Kiyemba*, 561 F.3d at 517-518 (Kavanaugh, J., concurring). The decision that a foreign government's categorial assurance against torture is sufficient to be accepted for all aliens is itself a "foreign policy" judgment the Judiciary "is not suited" to question. *Munaf*, 553 U.S. at 702.

Any objection to the government's reliance on a categorical assurance from a foreign government does not sound in procedural due process at all. It is a substantive objection that an assurance alone provides insufficient basis for the government to find that an alien is not likely to be tortured. Attempts to "recast in 'procedural due process' terms" what is really a challenge to the "'substantive'" criteria that the government has adopted have been rejected. *Reno v. Flores*, 507 U.S. 292, 308 (1993) (rejecting similar argument for "individual[ized]" procedure). For



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good reason: It makes no sense to require the Government to provide additional process with respect to potential evidence that is immaterial under the substantive standard the government has adopted. When the government is satisfied based on foreign assurances that no alien will be tortured in the receiving country, a further "individualized" assessment serves no rational purpose.

2. For aliens being removed to a third country not covered by adequate assurances, the Guidance memoranda state that DHS will first inform the alien of removal to that country and then give him an opportunity to affirmatively state that he fears removal there. If the alien does so, immigration officials will generally screen the alien within 24 hours to determine whether he "would more likely than not" be tortured if sent to that country. If not, the alien will be removed; if so, the alien will be placed in further administrative proceedings—or if appropriate, the government "may choose to designate another country for removal."

Petitioner apparently believes these procedures are also constitutionally inadequate. On the contrary, they are entirely consistent with established immigration law. Most analogous, in expedited-removal proceedings, aliens are expected to raise fears of removal "almost immediately," and are often processed in a matter of hours. See, *e.g.*, 8 U.S.C. § 1225(b)(1)(B)(i). If the asylum officer decides the alien does not have a credible fear, any review by an immigration judge must be completed within seven days after that finding was made. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(e). The expedited-removal statute does not limit the countries to which an alien can be removed pursuant to Section 1231(b), see 8 U.S.C. § 1225(b), so its expedited procedures for raising and assessing fear claims apply even when an alien is removed somewhere other than his home country, see, *e.g.,* 8 U.S.C. §§ 1231(b)(1)(A)-(C) (listing alien's country of birth or citizenry as alternatives only where removal to the country from which the alien arrived is unavailable).



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3. The Petitioner puts forth no evidence that the Federal Respondents are exercising their statutory authority pursuant to 8 U.S.C. § 1231(b)(2)(E)(vii) to effectuate the Petitioner's removal to a third country for punitive reasons. Petitioner's contention that he should have relief because third country removal amounts to unconstitutional "banishment" is simply a call for an across-the-board judicial nullification of the Executive Branch's statutory authority to remove persons whose presence in this Country is unlawful to a third country. However, Congressional statutes are presumed constitutional. *Heller v. Doe*, 509 U.S. 312, 320 (1993). And "[removal] of an alien to a country other than the one whence he came does not violate due process under the Fifth Amendment." *Petition for Milanovic*, 162 F. Supp. 890, 896 (S.D.N.Y. 1957), *aff'd sub nom. United States v. Murff*, 253 F.2d 941 (2d Cir. 1958). Federal Respondent's statutory authority to remove the Petitioner to a third country may not be disregarded simply based on the Petitioner's self-serving declaration that it amounts to "unconstitutional banishment."

Because the statute is not unconstitutional on its face, the Petitioner's burden is to prove that it is being applied unconstitutionally to *him*, *i.e.*, that third country removal is being considered in *his* case, or being exercised in a particular manner in *his* case, with the purpose and design of punishing *him* rather than simply as an exercise of the Executive Branch's constitutional statutory power granted to Federal Respondents by Congress.

Nothing in the Petition establishes that Federal Respondents are exercising their authority in an unconstitutional manner in Petitioner case. Rather, Petitioner simply makes unevidenced allegations that the Government is engaging in "punitive removal practices" because he says so. The Court may not assume that the Government is operating out of bad motives. To the contrary, Federal Respondents are entitled to a presumption of regularity. *Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542 (2025). For the Petitioner to overcome that presumption, the Petitioner must come forward with evidence demonstrating that Federal



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Respondents are attempting to remove him to a third country out of unconstitutional motives in his individual case. Having failed to come forward with such evidence, Petitioner is not entitled to obtain relief based on an unevidenced argument that Federal Respondents will be acting unconstitutionally in effecting his removal to a third country.

*iv. The Non-Merits Factors Likewise Support the Government, Not the Petitioner*

The remaining considerations favor Federal Respondents. The Petitioner has not established irreparable harm that warrants extraordinary relief. The Court may not assume that "the burden of removal alone ... constitute[s] the requisite irreparable injury." *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (quoting *Nken*, 556 U.S. at 435). Instead, a noncitizen must show that there is a reason specific to his or her case, as opposed to a reason that would apply equally well to all aliens and all cases, that removal would inflict irreparable harm. *Id.*

The Petitioner has not identified any sort of imminent or irreparable harm. Indeed, Petitioner's entire argument is premised on what Federal Respondents *may do* as distinguished from what they have done. Petitioner's fear that the Federal Respondent *may* violate his constitutional rights is not a sufficient injury for an injunction under *Winter* because he has not established that irreparable harm is likely. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

By contrast, as underscored by the Supreme Court's recent trio of stays in similar cases involving immigration policy, the government suffers irreparable harm when the Executive Branch is barred from implementing its immigration policies. *See Noem v. Nat'l TPS All.*, ___ U.S. ___, 145 S. Ct. 2728 (2025); *Noem v. Doe*, ___ U.S.___, 145 S. Ct. 1524 (2025); *D.V.D.*, 145 S. Ct 2153. The government suffers irreparable sovereign harm whenever its policy is blocked by a court order. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *cf. Trump v. CASA, Inc.*, 606 U.S. 831, 859 (2025) (holding that the Executive



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Branch is irreparably harmed by an injunction that exceeds a district court's power and improperly intrudes on executive prerogatives). That harm is even more acute in the immigration context, where the Constitution assigns preeminent power to the political branches. *See Galvan v. Press*, 347 U.S. 522, 531 (1954).

Nor are these costs in service of any public benefit. The United States relies on third countries to facilitate the removal of aliens who are difficult to otherwise remove. Absent an effective third-country removal policy, the United States is forced to retain (and often, release) aliens into the community, some of whom may pose a danger. The public is not served by an injunction that hollows the efficacy of this policy. *See Nken*, 556 U.S. at 436 (recognizing the "public interest in prompt execution of removal orders").

## II. PETITIONER'S UNEVIDENCED ALLEGATIONS CONCERNING THE CONDITIONS OF HIS CONFINEMENT PROVIDE NO BASIS FOR RELEASE FROM DETENTION.

Petitioner has failed to demonstrate that he is entitled to any form of relief under the Eighth Amendment or the Fifth Amendment. Petitioner's unevidenced allegations do not demonstrate that his detention has become either unreasonable or punitive. *See Ledesma Gonzalez v. Bostock,* 2025 WL 2841574, at *2 (W.D. Wash. Oct. 7, 2025) ("Because habeas proceedings are civil in nature, the petitioner bears the burden of proving that he is being held contrary to law and he must satisfy his burden of proof by a preponderance of the evidence.") (cleaned up).

Petitioner's Fifth claim is essentially a conditions of confinement claim, with an emphasis on the medical care he has received while detained at NWIPC. *See* Dkt. # 9, at ¶¶ 10, 47-57, 123-128. This Court should not consider this conditions of confinement claim as part of a 28 U.S.C. § 2241 habeas corpus petition. Challenges to the legality or duration of confinement should be pursued in a habeas proceeding, *see Crawford v Bell*, 599 F.2d 890, 891 (9th Cir.



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1979), while challenges to conditions of confinement should be pursued in a civil rights action. *See Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991). Moreover, "[t]he appropriate remedy for such constitutional violations, if proven, would be a judicially mandated change in conditions and/or an award of damages, but not release from confinement." *Crawford*, 599 F.2d at 891.

While courts in this District have adjudicated conditions of confinement claims related to the COVID-19 pandemic, those cases were decided under unique circumstances not present here. *See, e.g.*, *Dawson v. Asher*, No. 20-cv-0409, 2020 WL 1704324, at *8-9 (W.D. Wash. Apr. 8, 2020) (explaining the circumstances under which the Court undertook consideration of COVID-19-related conditions of confinement claims in petitions brought under 28 U.S.C. § 2241). Accordingly, this Court should decline to extend such consideration to the claim in this case.

Furthermore, Petitioner's detention is not punitive because it is reasonably related to legitimate governmental objectives. When evaluating the constitutionality of civil detention conditions under the Fifth Amendment, a district court must determine whether those conditions "amount to punishment of the detainee." *Bell*, 441 U.S. at 535. A petitioner may show punishment through an express intent to punish or a condition that is not "reasonably related to a legitimate governmental objective." *Id.*; *see also Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (noting that "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose"). "A restriction is punitive where it is intended to punish, or where it is 'excessive in relation to [its] non-punitive purpose.'" *See Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004).

Petitioner presents no evidence that the medical treatment at the NWIPC constitutes an express intent to punish him. Indeed, he presents no evidence whatsoever. He thus falls well short of demonstrating that his confinement at NWIPC with the medical treatment available is so



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excessive that it evinces "an expressed intent to punish on the part of detention facility officials." *Bell*, 441 U.S. at 538.

**CONCLUSION**

For the foregoing reasons, Federal Respondents respectfully request that this Court deny the Petition insofar as the Petitioner seeks an order enjoining Federal Respondents from removing him to a third country and for relief based on his conditions of confinement.

DATED this 6th day of February, 2026.

Respectfully submitted,

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