IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EMMANUEL BLANKSON MARFO, Petitioner, v. KEVIN RAYCRAFT, et al., Respondents.	)	CASE NO. 3:26-cv-01293 JUDGE BENITA Y. PEARSON

BRIEF IN OPPOSITION TO PRELIMINARY INJUNCTION

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STATEMENT OF ISSUES

Issue 1

Whether Petitioner is prohibited from bringing an individual action because he is a member of the class certified in *D.V.D.*?

Issue 2

Whether Petitioner's claims are subject to dismissal under *res judicata* because judgment has been entered in *D.V.D.* and class members like Petitioner are barred from seeking second bite at the apple on the same claims in different courts?

Issue 3

Whether this Court lacks jurisdiction to review Petitioner's claims because 8 U.S.C. § 1252 strips jurisdictions and channels challenges to the Court of Appeals via a Petition for Review?

Issue 4

Whether Petitioner's removal to Sierra Leone is authorized by 8 U.S.C. § 1231?

Issue 5

Whether Petitioner's custody is lawful because he has a final order of removal and has been detained for less than six months?

SUMMARY OF THE ARGUMENT

Respondents respectfully oppose the issuance of a preliminary injunction in this case. Petitioner Emmanuel Blankson Marfo ("Petitioner") is illegally in the United States and has a final order of removal. Sierra Leone has agreed to accept Petitioner and has given diplomatic assurances that he will not be subject to persecution or torture in Sierra Leone or in any country to which he may be transferred by Sierra Leone. Therefore, Petitioner's removal to Sierra Leone is authorized by 8 U.S.C. § 1231 which provides that an alien who cannot be removed to a country where they are a citizen or resident may be removed to any "country whose government will accept the alien into that country." 8 U.S.C. § 1231(b)(2)(E)(vii); *see also* 8 U.S.C. § 1231(b)(1)(C)(iv).

This action is prohibited for several reasons. First, Petitioner is a member of a non-opt out class under Fed. R. Civ. P. 23(b)(2). Specifically, in *DVD v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 378 (D. Mass. 2025), the District of Massachusetts certified a class under Rule 23(b)(2) consisting of:

> 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.

In the same order, the court entered a preliminary injunction based on due process concerns and required, *inter alia,* written notice of the country to which ICE seeks to remove the alien and additional opportunities to raise a fear-based claim. *Id.* Allowing Petitioner's suit to proceed would jeopardize the nature and function of Rule 23(b)(2) class actions because allowing individual class members to pursue habeas claims would result in obtaining disparate, individualized relief not afforded to the class. The resulting inconsistent judgments and

standards are antithetical to the basic nature of Rule 23(b)(2), which both ensures and requires an "indivisible" result in which the class wins or loses as a whole and the entire class receives the same remedy.

Second, several independent jurisdictional bars strip the Court of jurisdiction over determining where or how Petitioner may be removed. The Court lacks jurisdiction under 8 U.S.C. § 1252(g) to review Petitioner's claims because they arise from the execution of his removal order and § 1252(g) bars claims arising from the decision or action to "execute removal orders."

Petitioner's claims are similarly barred in this Court by 8 U.S.C. §§ 1252(a)(5) and (b)(9). By law, "the sole and exclusive means for judicial review of an order of removal" is a "petition for review filed with an appropriate court of appeals," that is, "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. §§ 1252(a)(5), (b)(2). This explicitly excludes "section 2241 of title 28, or any other habeas corpus provision." 8 U.S.C. § 1252(a)(5).

The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") and 8 U.S.C. § 1252(a)(4) also preclude this Court from issuing the requested relief. Specifically, § 1252(a)(4) provides that "[n]otwithstanding any other provision of law," "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]." And FARRA, which implemented U.S. obligations under Article 3 of CAT, further confirms that "no court shall have jurisdiction to review…any…determination made with respect to the application of [CAT]…except as part of the review of a final order of removal." § 2242(d), 112 Stat. 2681-822 (8 U.S.C. § 1231 note); *see* 8 C.F.R. § 208.18(e). Accordingly, district courts are precluded from reviewing claims alleging violations under CAT

and FARRA. The Court, therefore, should decline to issue a preliminary injunction and should dismiss Petitioner's habeas petition.

BACKGROUND

Petitioner Emmanuel Blankson Marfo ("Petitioner") is a native and citizen of Ghana. (Form I-867A Record of Sworn Statement, attached as Gov't Ex. D.) He claims to have illegally entered the United States on or about December 6, 2021, by walking across the border from Mexico near Calexico, California. (*Id.*) He was apprehended by Border Patrol eight days later. (*Id.*) Petitioner was charged as an alien present in the United States who had not been admitted or paroled on the Notice to Appear issued after an asylum officer determined that Petitioner demonstrated a credible fear of persecution or torture. (Notice to Appear, attached as Gov't Ex. E.) An Immigration Judge (IJ) found Petitioner removable but granted Petitioner withholding of removal to Ghana under INA § 241(b)(3). (Ex. A - Order of the Immigration Judge, ECF No. 5-1 PageID #44-47.)

Sierra Leone, through its ministry of Foreign Affairs and International Cooperation, has agreed to accept certain aliens under final orders of removal from the United States. (Ex. B - Decl. of Vu Cam, ECF No. 5-2 PageID #49, at ¶ 4.) The government elevated Petitioner's name through the Department of State to Sierra Leone for potential removal. (*Id.* at ¶ 5.) On May 15, 2026, the government received notification that Petitioner was accepted by Sierra Leone. (*Id.*)

Sierra Leone has provided diplomatic assurances that the aliens removed from the United States pursuant to the Third Country Removal agreement (including Petitioner) will not be subject to persecution or torture in Sierra Leone or in any country to which they may be transferred by Sierra Leone. (*Id.* at ¶ 6.) On March 2, 2026, the Department of State determined that the diplomatic assurances were credible. (*Id.*) Given that Sierre Leone accepted Petitioner, ICE intends to remove him to Sierra Leone. (*Id.* at ¶ 7.) He was placed on the manifest for a

charter flight scheduled for June 16, 2026. (*Id.*) As a result, Petitioner was detained by ICE agents on May 29, 2026. (Pet. ECF No. 1 PageID # 2, at ¶ 4.)

On June 3, 2026, Petitioner filed a petitioner for writ of habeas corpus seeking release from detention. (*Id.* at PageID # 11.) On June 16, 2026, this Court issued an order prohibiting Petitioner's removal from the United States. (ECF No. 4 PageID # 29.) On June 17, 2026, the Court granted Petitioner's Motion for Temporary Restraining Order, prohibited the government from removing Petitioner from the United States, and ordered that Petitioner be transferred back to the Northern District of Ohio. (ECF No. 6 PageID # 54.) The government now submits this opposition to the issuance of a preliminary injunction.

LAW AND ARGUMENT

I. Preliminary Injunction Standard

In evaluating a motion for preliminary injunction, the court must balance four factors: "'(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.'" *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 385 (6th Cir. 2020) (quoting *ACLU Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015)). These factors are not prerequisites and should "be balanced against each other." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (citations omitted). A court should consider "all four factors to determine whether, taken together, they clearly weigh in favor of granting injunctive relief." *PCC Airfoils, LLC v. Daugherty*, 176 F.4th 509, 512 (6th Cir. 2026).

Preliminary injunctions are a discretionary remedy intended to "'maintain[s] the status quo pending determination of an action on its merits.'" *Burniac v. Wells Fargo Bank, N.A.*, 810 F.3d 429, 435 (6th Cir. 2016) (quoting *Blaylock v. Checker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976)). Like temporary restraining orders, "the preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (internal quotation marks and citations omitted). The party seeking a "preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012) (citing *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974)). Importantly, "'the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion' because a preliminary injunction is an extraordinary remedy." *Id.* (quoting *Leary*, 228 F.3d at 739). As discussed more fully below, Petitioner cannot meet his burden on any of these factors and a preliminary injunction is unwarranted.

II. Removal of Aliens to Third Countries

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, authorizes the removal of certain classes of aliens from the United States. 8 U.S.C. §§ 1182(a), 1227(a), 1231. The removal process can include a hearing before an immigration judge, an appeal to the Board of Immigration Appeals, and review in a court of appeals. 8 U.S.C. §§ 1229a, 1252. Aliens facing removal have an opportunity to apply for relief or protection from removal. *See, e.g.*, 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1229b (cancellation of removal); 8 U.S.C.§ 1229c (voluntary departure); 8 U.S.C. § 1231(b)(3) (withholding of removal).

Congress has provided two means for an alien to challenge removal to a particular country where he may face persecution or torture. First, an alien may seek withholding of removal under Section 1231(b)(3). Statutory withholding generally prohibits removing an alien to a country where he would face persecution because of his "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); *see* 8 U.S.C. § 1231(b)(3)(B) (listing certain aliens ineligible for statutory withholding). "[P]ersecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat," and requires (among other things) the "infliction" of such harm "by the government of a country or by persons or an organization that the government was unable or unwilling to control." 8 C.F.R. § 1208.1(e); *see, e.g.*, *Orelien v. Gonzales*, 567 F.3d 67, 71 (1st Cir. 2006) (noting that the "threshold" for demonstrating persecution "is not easily crossed") *Medina v. U.S. Att'y Gen.*, 800 Fed. Appx. 851, 856 (11th Cir. 2020) (alien seeking withholding must clear a "high bar").

Second, the alien may seek relief under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85—a treaty that addresses the removal of aliens to countries where they would face torture. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822; 8 C.F.R. §§ 208.31, 241.8(e). "Torture" is defined as an "extreme form of cruel and inhuman treatment," which intentionally inflicts "severe pain or suffering" on another for an improper purpose, and is performed "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." 8

C.F.R. § 208.18(a)(1) and (a)(2); *see, e.g.*, *Rodríguez-Villar v. Barr*, 930 F.3d 24, 30 (1st Cir. 2019) (characterizing "torture" as a "higher bar" than persecution).

Statutory withholding and CAT protection affect only *where*, not *whether*, an alien may be removed. A grant of statutory withholding means the alien is "presently protected" from removal to the particular country covered by the grant, though it "would not prevent" that alien's removal to "any other hospitable country." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). Likewise, a grant of CAT protection "means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country." *Nasrallah v. Barr*, 590 U.S. 573, 582 (2020). The United States remains free to remove the alien "at any time to another country where he or she is not likely to be tortured." *Id.* (citation omitted).

Once there is a final order of removal, the INA provides the Executive Branch with the authority to execute orders of removal and to ensure that aliens who have been ordered removed are in fact removed from the United States. Further, the INA establishes criteria for determining the country to which an alien will be removed. *See Jama v. ICE*, 543 U.S. 335, 338-341 (2005). Specifically, 8 U.S.C. § 1231(b) provides sequences of countries to which the alien shall be removed, subject to certain disqualifying conditions. DHS has the sole discretion to remove an alien to any country designated in 8 U.S.C. § 1231(b). Possible destinations include a country designated by the alien, the alien's country of citizenship, and the alien's country of residence. *Jama*, 543 U.S. at 341. Section 1231(b) offers a fail-safe option in the event the others do not work—any other "country whose government will accept the alien into that country." 8 U.S.C. § 1231(b)(2)(E)(vii); *see also* 8 U.S.C. § 1231(b)(1)(C)(iv). Such countries may be selected even if not originally listed in an alien's removal order. *See* 8 C.F.R. § 1240.12(d). The fail-safe

option may be the only way to remove aliens who have protection from removal to the sole country to which they have connections. *See* 8 U.S.C. § 1231(b)(2).

"Third country removals"—*i.e.* removals to countries other than the those designated in removal orders—are sometimes the only way to execute a valid and final removal order. In some cases, third-country removal is necessary because removal to the country specified in the removal order is no longer viable by the time DHS is prepared to remove the alien. In other cases, an alien may obtain withholding of removal or CAT protection from the only country listed in his removal order, either in his original proceedings or later ones (as with reinstated orders). And some countries refuse to accept the return of their nationals who, for example, have committed serious crimes in the United States. Such aliens may have to be removed under the INA's catch-all provision permitting their removal to any country that will accept them. *See* 8 U.S.C. § 1231(b)(2)(E)(vii), (1)(C)(iv); *Jama*, 543 U.S. at 347 (discussing the "removable-but-unremovable limbo" some aliens would experience absent removal to a third country). The need for such "third country removals"—*i.e.* removals to countries other than the ones designated in removal orders—is not uncommon. In those cases, third-country removal is the only way for DHS to execute a lawful removal order. 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. *See* 8 U.S.C. §§ 1231(b)(2)(E)(vii), (1)(C)(iv).

Although the INA authorizes removal of aliens who have received a final order of removal to a third country, it does not provide any additional, specific process that aliens must receive under CAT after a final order of removal has been issued, but prior to removal to a third country. Congress has delegated the decision regarding the appropriate process entirely to the Executive Branch. *See* 8 U.S.C. § 1231 note ("[. . .] 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 [. . .]").

On March 30, 2025, DHS Secretary Kristi Noem issued a memorandum detailing DHS's policy in this regard entitled Guidance Regarding Third Country Removal ("Guidance"), which outlines the "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 removal in those removal orders." (Memorandum dated Mar. 30, 2025, attached as Gov't Ex. C.)[1] The Guidance distinguishes between removals to countries that have provided credible diplomatic assurances that any aliens removed there will not be persecuted or tortured, and removals to those countries that have not provided such assurances. (*Id.*)

For countries that have provided such diplomatic assurances, "the alien may be removed without the need for further procedures." (*Id.*) For countries that have not, the Guidance provides for notice of the third country and an opportunity for the alien to "affirmatively express a fear of persecution or torture" there, with subsequent review outside of the immigration courts. (*Id.*)

III. Petitioner's Suit Cannot Proceed Because He is a Member of the *D.V.D.* Class

This action is prohibited because Petitioner is a member of a non-opt out class under Fed. R. Civ. P. 23(b)(2). In March 2025, three plaintiffs instituted a putative class action suit challenging their third country removals under the Noem Guidance. *DVD v. U.S. Dep't of*

[1] 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) ("Removal of aliens who are not permanent residents").

Homeland Sec., D. Mass. Case No. 1:25-cv-10676. On April 18, 2025, the District of Massachusetts certified a class under Rule 23(b)(2) consisting of:

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

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

In the same order, the court entered a preliminary injunction based on due process concerns with the Guidance. The preliminary injunction required, *inter alia,* written notice of the country to which ICE seeks to remove the alien and additional opportunities to raise a fear-based claim. Specifically, the district court found that non-individualized diplomatic assurances do not satisfy due process and "offer no protection against either torture by non-state actors or chain refoulement, whereby the third country proceeds to return an individual to his country of origin." *Id.* at 390 (citing Plaintiffs' complaint discussing chain refoulement). The Court also held that the Guidance was insufficient because it did not provide sufficient notice and opportunity for class members to be heard regarding any fear of return to the third country. *Id.*

The Government appealed, and after the First Circuit denied the Government's request for a stay, applied for a stay of the preliminary injunction in the Supreme Court. *DHS v. D.V.D.*, Application for a Stay, 24A1153 (May 2, 2025). On June 23, 2025, the Supreme Court granted the requested stay in its entirety as to both the named plaintiffs and the class-wide relief. *DHS v. D.V.D.*, 145 S. Ct. 2153 (2025) (*D.V.D. I*). That same day, despite the Supreme Court's stay, the district court nonetheless purported to enforce its since-stayed injunction as to eight class members in DHS custody in Djibouti. *D.V.D.*, ECF No. 176 (June 23, 2023). It ordered the Government to carry out the preliminary injunction procedures the Supreme Court had stayed.

Id. The Government immediately moved to clarify the Supreme Court's stay. *DHS v. D.V.D.*, Motion for Clarification, 24A1153 (June 24, 2025). On July 3, 2025, the Supreme Court granted the Government's motion. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2627 (2025) (*D.V.D. II*). The Supreme Court held that its "June 23 order stayed the April 18 preliminary injunction in full," and the district court could not "enforce an injunction that [the Supreme Court's] stay rendered unenforceable." *Id.* at 2; *see also N.I.H. v. Am. Pub. Health Ass'n.*, Order on Application for Stay, 25A103 (August 21, 2025) (Gorsuch, J., concurring) (Supreme Court's clarification order "should have been unnecessary").

Since then, the district court has entered final judgment in favor of the class members, and the First Circuit has granted a stay of that judgment pending the government's appeal, which has been fully briefed and argued. *D.V.D. v. D.H.S.*, 25-10676, 2026 U.S. Dist. LEXIS 38553 (D. Mass. Feb. 25, 2026); *D.V.D. v. D.H.S.*, 26-1212 (1st Cir. Mar. 16, 2026).

Despite—or perhaps because of—the Supreme Court's order staying the *D.V.D.* preliminary injunction, the subsequent refusal of the District of Massachusetts to issue preliminary relief to individual class members, and the First Circuit's stay of the final judgment, some *D.V.D.* class members (like Petitioner) have attempted to *de facto* opt out of the Rule 23(b)(2) class by filing individual habeas petitions seeking the *same relief* pursued by the *D.V.D.* class and stayed by the Supreme Court and the First Circuit. Many district courts have correctly dismissed these quasi-opt outs or transferred them to the District of Massachusetts to be treated as part of the *D.V.D.* litigation.[2]

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[2] *See, e.g., Nolasco v. Noem,* No GLR-25-3847, 2026 U.S. Dist. LEXIS 268, *17-18 (D. Md. Jan. 5, 2026); *Tanha v. Warden, Balt. Det. Facility*, No. JRR-25-2121, 2025 U.S. Dist. LEXIS 140142, *8 (D. Md. July 22, 2025); *Ghamelian v. Baker*, No. SAG-25-2106, 2025 U.S. Dist. LEXIS 139238, at *3, 5 (D. Md. July 22, 2025); *Phan v. DHS,* 25-2147, Minute Order (D.D.C.

In this case, allowing Petitioner's suit to proceed would be inconsistent with—and, indeed, would jeopardize—the nature and function of Rule 23(b)(2) class actions. The defining features of a Rule 23(b)(2) class are the indivisible nature of the relief sought and the inability of class members to opt out. Rule 23(b)(2) classes are permitted only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). By rule, relief can be entered only with respect to the class as a whole. *See id.* R. 23(c)(3)(A). Rule 23(b)(2) classes can thus be certified only when "the relief sought must perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 361-62 (2011). "For that reason," Rule 23(b)(2) classes are "mandatory classes," with "no opportunity" for "class members to opt out" and litigate their claims individually. *Id.* at 362.

Allowing individual class members to pursue habeas claims would result in obtaining disparate, individualized relief not afforded to the class. The resulting inconsistent judgments and standards are antithetical to the basic nature of Rule 23(b)(2), which both ensures and requires an "indivisible" result in which the class wins or loses as a whole and the entire class receives the same remedy. *See Wal-Mart,* 564 U.S. at 362-63; Fed. R. Civ. P. 23(c)(3) (providing that "the judgment in a class action" applies to "those whom the court finds to be class members," "[w]hether or not [the judgment is] favorable to the class"). That orderly procedural mechanism turns into an intractable morass if the exact same individuals can sue separately and obtain different, conflicting judgments on the same claims, creating the very risk of differing requirements governing class members that Rule 23(b)(2) exists to prevent. Thus, Petitioner

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July 4, 2025). *I.V.I. v. Baker*, No. JKB-25-1572, 2025 U.S. Dist. LEXIS 101188, at *2 (D. Md. May 27, 2025).

should not be permitted to pursue an individualized remedy through this Court and his habeas petition should be dismissed.

Moreover, other procedural rules aimed at preventing or resolving conflicting judgments compel the same result. The first-to-file rule controls before judgment, and *res judicata* applies once final judgment has been entered. "The first-to-file rule is a prudential doctrine that grows out of the need to manage overlapping litigation across multiple districts." *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 789 (6th Cir. 2016). This rule provides that "when actions involving nearly identical parties and issues have been filed in two different district courts, 'the court in which the first suit was filed suit should generally proceed to judgment.'" *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535,551 (6th Cir. 2007) (quoting *Zide Sprot Shop of Ohio v. Ed Tobergte Assoc., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001)). The claims Petitioner brings are already being litigated for him as a *D.V.D.* class member, so this Court should not entertain his second-filed petition. *Baatz*, 814 F.3d at 793 (applying the first-to-file rule in the class action context); *D.C. v. Fairfax Cnty. Sch. Bd.*, 171 F.4th 255, 265 (4th Cir. 2026) (applying the first-to-file rule to dismiss plaintiffs from a class action lawsuit who had first filed an individual suit); *McNeil v. Guthrie,* 945 F.3d 1163, 1166 (10th Cir. 1991) ("Claims for equitable relief must be made through the class representative until the class action is over or the consent decree is modified.").

Petitioner's claims are likewise subject to dismissal under *res judicata* because judgment has been entered in *D.V.D.* and class members like Petitioner are barred from seeking second bite at the apple on the same claims in different courts. "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank,* 467 U.S. 867, 874 (1984); That Petitioner's

suit is barred by the final judgment in *D.V.D.* is the straightforward consequence of the finality of that action. *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) ("properly conducted class actions" have a "preclusive effect on nonparties").

Petitioner is concededly a member of the class certified in *D.V.D.* (Mot. for Temporary Restraining Order, ECF No. 2 PageID # 22.) He challenges the same decisions and seeks relief for the same injury alleged by the *D.V.D.* class members. Specifically, Petitioner claims that third country removal to Sierra Leone without adequate procedures violates his constitutional rights under the Fifth Amendment. He does not dispute that his claims arise from the application of the Guidance—the policy being challenged in *D.V.D.* Petitioner's case is indivisible and indistinguishable from the *D.V.D.* class action. Indeed, if the class-wide judgment were not stayed, he would be a beneficiary of the decision and would be entitled to its relief. Thus, this Court should dismiss Petitioner's duplicative action.

IV. The Court Has Been Stripped of Jurisduction to Review Petitioner's Claims

Several independent jurisdictional bars strip the Court of jurisdiction over determining where or how Petitioner may be removed.[3] First, the Court lacks jurisdiction under 8 U.S.C. § 1252(g) to review Petitioner's claims because they arise from the execution of his removal order. Section 1252(g) bars claims arising from three discrete actions, including, as relevant here, the decision or action to "execute removal orders." *Id.* In enacting § 1252(g), Congress spoke clearly, providing that "no court" has jurisdiction over "any cause or claim" arising from the execution of removal orders, "notwithstanding any other provision of law," whether "statutory or nonstatutory," including habeas, mandamus, or the All-Writs Act. *Id.*; *accord, Elgharib v.*

[3] The government concedes that this Court has jurisdiction to review the length of Petitioner's detention, as discussed in Section VII.

Napolitano, 600 F.3d 597, 605 (6th Cir. 2010) (holding that Section 1252(g) precludes jurisdiction under the All-Writs Act); *Sadhvani v. Chertoff,* 460 F.Supp.2d 114, 122 (D.D.C. 2006) (same). Accordingly, by its terms, this jurisdiction-stripping provision precludes habeas review under 28 U.S.C. § 2241 of claims arising from a decision or action to "execute" a final order of removal. *See Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471, 482 (1999); *see also Singh v. Napolitano*, 500 F. App'x 50, 52 (2d Cir. 2012) (holding that attempt to "employ[] a habeas petition effectively to challenge the validity and execution of [a] removal order," even "indirectly," is "jurisdictionally barred"). The decision to execute a removal order is committed to the discretion of the Executive Branch, and Section 1252(g) was designed to protect that discretion and to avoid the "deconstruction, fragmentation, and hence prolongation of removal proceedings." *AADC*, 525 U.S. at 487.

Section 1252(g) also applies to constitutional claims arising from the execution of a final order of removal, as the language barring "any cause or claim" made it "unnecessary for Congress to enumerate every possible cause or claim[.]" *AADC*, 525 U.S. at 487; *accord Silva v. United States*, 866 F.3d 938, 940-41 (8th Cir. 2017). Further, *AADC* established that Section 1252(g) is "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *Alvarez v. ICE*, 818 F.3d 1194, 1205 (11th Cir. 2016) (quoting, *AADC,* 525 U.S. at 485). Section 1252(g) therefore precludes "[e]fforts to challenge the refusal to exercise [favorable] discretion on behalf of specific aliens[.]" *Id.* (quoting *AADC*, 525 at 485).

In the case here, Section's 1252(g)'s prohibition is pronounced. Petitioner's case arises from the execution of his final order of removal and his notice that such removal would be to a

third country, which is the government's only option to execute his removal order in light of the order granting withholding of removal as to Ghana.

Second, Petitioner's claims are barred in this Court by 8 U.S.C. §§ 1252(a)(5) and (b)(9). By law, "the sole and exclusive means for judicial review of an order of removal" is a "petition for review filed with an appropriate court of appeals," that is, "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. §§ 1252(a)(5), (b)(2). This explicitly excludes "section 2241 of title 28, or any other habeas corpus provision." 8 U.S.C. § 1252(a)(5). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of *all* [claims arising from deportation proceedings]" to a court of appeals in the first instance. *AADC*, 525 U.S. at 483. "Taken together, §[§] 1252(a)(5) and [(b)(9)] mean that *any* issue— whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016). Section 1252(b)(9) thus eliminates this Court's jurisdiction over Petitioner's claims by channeling "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" to the courts of appeals. Accordingly, this Court lacks jurisdiction under Sections 1252(a)(5) and (b)(9) to review Petitioner's request enjoin his removal from the United States to Sierra Leone. *See J.E.F.M.*, 837 F.3d at 1031; *see also, Mata v. DHS*, 426 F. App'x 698, 700 (11th Cir. 2011); *Canal A Media Holding, LLC v. USCIS*, 964 F.3d 1250, 1257-58. (11th Cir. 2020); *Camarena v. ICE,* 988 F.3d 1268, 1272 (11th Cir. 2021); *Linares v. DHS*, 529 F. App'x 983 (11th Cir. 2013); *Themeus v. DOJ*, 643 F. App'x 830 (11th Cir. 2016).

Third, the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") and 8 U.S.C. § 1252(a)(4) also preclude this Court from issuing the requested relief. Importantly, the Convention Against Torture ("CAT") is not self-executing. *See Medellin v. Texas*, 552 U.S. 491, 505, 520 (2008); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Rather, it is only operative domestically insofar as Congress implements it by statute. Congress, in its discretion, implemented it by directing the issuance of regulations, expressly depriving courts of jurisdiction to review those regulations, and channeling all review of individual CAT claims into review of final orders of removal.

Specifically, the INA provides that "[n]otwithstanding any other provision of law," "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). And FARRA, which implemented U.S. obligations under Article 3 of CAT, further confirms that "no court shall have jurisdiction to review…any…determination made with respect to the application of [CAT]…except as part of the review of a final order of removal." § 2242(d), 112 Stat. 2681-822 (8 U.S.C. § 1231 note); *see* 8 C.F.R. § 208.18(e). Accordingly, district courts are precluded from reviewing claims alleging violations under CAT and FARRA. *Mironescu v. Costner*, 480 F.3d 664, 667, 674 (4th Cir. 2007).

The court in *Agyemang v. Warden of Clinton County Correctional Facility*, No. 3:26-CV-00688, 2026 WL 1558255 (M.D. Pa. Jun. 6, 2026), faced an identical case to the one present here. In that case, a citizen of Ghana was ordered removed but the Immigration Judge withheld removal to Ghana under CAT. *Id.* at *1. The government decided to remove the alien to Sierra Leone. *Id.* The alien filed an emergency motion in district court "requesting that the Court stay his removal until ICE affords him a fear interview on removal to Sierra Leone." *Id.* at *2. The

district court held that it did not have subject-matter jurisdiction to enjoin the alien's removal to Sierra Leone. *Id.* at *3. The Court explained that § 1252(g) "strips district courts of jurisdiction to review the Attorney General's decision to execute a removal order or actions taken to execute a removal order." *Id.* Further, § 1252(b)(9) "channels claims arising from actions taken to remove a noncitizen into a petition for review of a final order of removal...." *Id.* at *4. The district court ruled that the "government's designation of Sierra Leone for [the alien's] third-country removal is so bound up with the execution of his removal order that § 1252 and § 1252(b)(9) strip the Court of subject-matter jurisdiction to enjoin removal to Sierra Leone." *Id.* at *5. This Court should follow this decision and find it lacks subject-matter jurisdiction over Petitioner's claims.

V. The Supreme Court Has Determined that Petitioner is Unlikely to Succeed, as Demonstrated by its Orders in the *D.V.D.* Litigation

As noted above, the same issues that Petitioner raises herein are being actively litigated before the First Circuit in the *D.V.D. v. Dep't of Homeland Security* non-opt out class action. *See* No. 25-cv-10676, 2025 WL 114968 (D. Mass. Apr. 18, 2025). Specifically, the district court entered a class-wide preliminary injunction requiring, *inter alia,* written notice of the country to which ICE seeks to remove the alien and an opportunity to raise a fear-based claim. It did so after finding that the Guidance was constitutionally insufficient. The Government appealed and sought a stay of the preliminary injunction before the United States Court of Appeals for the First Circuit. After the First Circuit denied the Government's request for a stay, the Government applied for a stay of the preliminary injunction in the Supreme Court. In its application, the Government argued, among other things, that the Guidance comported with the Constitution's due process requirements.

On June 23, 2025, the Supreme Court stayed the injunction in its entirety as to both the named Plaintiffs and the certified mandatory class. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025) (Mem.). On July 3, 2025, the Supreme Court again granted the Government's motion to stay the injunction and clarified its decision. *Dep't of Homeland Sec. v. D.V.D.,* 145 S. Ct. 2627 (2025). The Supreme Court held that its "June 23 order stayed the April 18 preliminary injunction in full" and therefore *the District Court could not "enforce an injunction that [its] stay rendered unenforceable*." *Id.* at 2629 (emphasis added). In issuing the stay, the Supreme Courte necessarily found that the Government was likely to prevail on the merits of its appeal regarding Guidance. *Department of Homeland Security v. D.V.D.*, 145 S. Ct. 2153 (2025) (Mem.), *clarified by* 145 S. Ct. 2627 (2025).

"[W]hen [the Supreme] Court issues a decision, it constitutes a precedent that commands respect." *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 606 U.S. ---, 145 S. Ct. 2658, 2263 (2005) (Mem.) (Gorsuch, J., concurring in part and dissenting in part). This includes stay decisions, which "squarely control[]" in "like cases." *Trump v. Boyle*, 606 U.S. ---, 145 S. Ct. 2653, 2654 (2025).

All arguments Petitioner makes in his habeas petition have been raised by counsel for the nationwide class in both their opposition to the Government's application for a stay of the preliminary injunction and motion for clarification raised the arguments Petitioner makes here. *See generally DHS v. D.V.D.*, No. 24A1153, Opposition to Application to Stay ("Stay Opp'n") (June 4, 2025); *DHS v. D.V.D.*, No. 24A1153 Opposition to Motion for Clarification ("Clarification Opp'n") (June 24, 2025). Most notably, they argued that the procedures provided by the Guidance were insufficient under the Fifth Amendment Due Process Clause. Stay Opp'n at 33-36. They also objected to the Government's claims of irreparable harm and mounted numerous arguments about the harm that would befall their class members who, at the time of

briefing, included eight aliens who the Government intended to send to South Sudan and who class counsel cited news articles they claimed demonstrated these eight aliens would be returned to their countries of origin. Stay Opp'n at 36-40; Clarification Opp'n at 3-5. Despite all these arguments, the Supreme Court sided with the Government – *twice*.

Moreover, the Supreme Court, by granting the stay, necessarily concluded that the balance of equities and public interest tipped in the Government's favor. *See Hollingsworth v. Perry,* 558 U.S. 183, 190 (2010) (setting the standard for an appellate stay). The Government argued that it was suffering an "ongoing irreparable injuring in the diplomatic, immigration, and foreign policy spheres." Application for a Stay, *Dep't of Homeland Sec. v. D.V.D.*, No. 24A1153 (U.S.S.C. May 2, 2025). The Government explained that "[f]inding third countries willing and able to accept aliens is a delicate diplomatic endeavor. By interjecting itself into that process, and disrupting those carefully negotiated arrangements, the court's actions have already caused major and irremediable harm to U.S. foreign policy." *Id.* at 8. By granting the stay, the Supreme Court found that this irremediable harm justified the granting of a stay. Accordingly, this Court should not issue a preliminary injunction because the Supreme Court has reviewed the same arguments raised by Petitioner, determined that the Government is likely to be successful, and found the Government would suffer irremediable harm if enjoined from applying the Guidance.

VI. Petitioner's Removal to Sierra Leone is Authorized by 8 U.S.C. § 1231(b)

Even if this Court had jurisdiction to review the government's execution of Petitioner's final order of removal, Petitioner's removal to Sierra Leone is authorized by the statutes and implementing guidance. As noted above, the catch-all provision contained in 8 U.S.C. §§ 1231(b)(2)(E)(vii) and (1)(C)(iv) allow ICE to remove an alien to any third country willing to accept the alien.

In this case, Sierra Leone, through its ministry of Foreign Affairs and International Cooperation, has agreed to accept certain aliens under final orders of removal from the United States. (Cam Decl., ECF No. 5-2 PageID # 49 at ¶ 4.) The government elevated Petitioner's name through the Department of State to Sierra Leone for potential removal. (*Id.* at ¶ 5.) On May 15, 2026, the government received notification that Petitioner was accepted by Sierra Leone. (*Id.*) Importantly, Sierra Leone has provided diplomatic assurances that the aliens removed from the United States pursuant to the Third Country Removal agreement (including Petitioner) will not be subject to persecution or torture in Sierra Leone or in any country in which they may be transferred to by Sierra Leone. (*Id.* at ¶ 6.) On March 2, 2026, the Department of State determined that the diplomatic assurances were credible. (*Id.*) Accordingly, Petitioner's removal to Sierra Leone is authorized by 8 U.S.C. § 1231(b) and the implementing guidance. Thus, he is unlikely to be successful on the merits of his habeas petition and no preliminary injunction should issue.

VII. Petitioner's Custody is Presumptively Reasonable

Petitioner's custody is presumptively reasonable and lawful because he has been detained for significantly less than six months and there is a significant likelihood of removal in the reasonably foreseeable future. 8 U.S.C. § 1231 authorizes immigration authorities to detain aliens with a final order of removal in order to remove them. In *Zadvydas*, the Supreme Court explained that the Government may detain a removable alien for a period reasonably necessary, beyond the 90-day threshold, to secure removal. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The Court concluded that post-removal order detention is presumptively reasonable for a period of six months. *Id.* at 701. Only after that six-month benchmark must a detainee present "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

When post-removal order detention has not exceeded six months, courts routinely deny habeas relief because the statutory authority under § 1231(a) remains valid and constitutional. *See, e.g.*, *Akinwale v. Ashcroft*, 287 F.3d 1050, 1051-52 & n.3 (11th Cir. 2002).

Here Petitioner has only been detained since May 29, 2026, far less than the presumptively reasonable six-month period. (Pet. ECF No. 1 PageID # 2 at ¶ 4.) As a result, Petitioner cannot meet the threshold requirement necessary to trigger a *Zadvydas* analysis. The Court should deny the Petition. Moreover, the government is actively seeking to remove him, and his removal is significantly likely in the reasonably foreseeable future. Accordingly, his custody is reasonable and lawful.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court decline to issue a preliminary injunction and dismiss Petitioner's habeas petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Loc. R. 7.1(f), I certify that the foregoing Brief in Opposition is twenty (20) pages in length and within the page limits for an unassigned matter.

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