UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

D.V.D.; M.M.; E.F.D.; and O.C.G., Plaintiffs, v. U.S. Department of Homeland Security; Kristi Noem, Secretary, in her official capacity; Pamela Bondi, U.S. Attorney General, in her official capacity; and Antone Moniz, Superintendent, Plymouth County Correctional Facility, in his official capacity, Defendants.	Civil Action No. 1:25-cv-10676-BEM Pages 1 to 71

BEFORE THE HONORABLE BRIAN E. MURPHY
UNITED STATES DISTRICT JUDGE

MOTION HEARING

March 28, 2025
12:00 p.m.

John J. Moakley United States Courthouse
Courtroom No. 12
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

THE CLERK: Civil Action No. 1:25-cv-10676, *D.V.D. et al. v. The U.S. Department of Homeland Security.*

If Counsel can please identify yourselves for the record, starting with Plaintiff's counsel.

MS. REALMUTO: Trina Realmuto from the National Immigration Litigation Alliance along with Kristin Macleod-Ball from the National Immigration Litigation Alliance, Matt Adams from Northwest Immigrant Rights Project, and Anwen Hughes from Human Rights First.

THE COURT: Good afternoon.

MS. LARAKERS: Mary Larakers on behalf of the United States.

THE COURT: Good afternoon.

So we're here on the temporary restraining order. We're not going to be addressing the class certification today. We'll schedule a date for that at the end of this.

I'm going to let you start, but I have a few preliminary questions that I was hoping I could address to make sure I'm on the right page in terms of what is and is not agreed upon.

And so the first question I have is: D.V.D. was supposed to report today. Do we know what happened?

MS. REALMUTO: We do. He reported for check-in and has a next check-in in September.

THE COURT: In September. Okay.

So I want to make sure that I'm under the same understanding that both of you are under. And the first is that the -- both of the named plaintiffs here and all potential class members have an order of removal that specifies a certain country. Correct?

MS. REALMUTO: Correct.

THE COURT: And just one country.

MS. REALMUTO: Correct.

THE COURT: And do orders of removal often specify more than one country?

MS. REALMUTO: Orders of removal can specify an alternative removal country. They don't have to. It's not so common, and that's why in our pleadings, we refer to third country deportations, because we account for the possibility of an alternative country of removal for people who are in Section 240 proceedings.

THE COURT: And am I correct in understanding that you are not contesting the validity of the orders of removal at all?

MS. REALMUTO: You're a hundred percent correct in that.

THE COURT: And if they were being removed to the country named in the order, you would have no objection?

MS. REALMUTO: We are not challenging that whatsoever.

THE COURT: And do you agree that the Government has the authority to change the country to which someone is being removed?

MS. REALMUTO: We agree that the statute provides for alternatives countries for which they could be removed in 8 U.S.C. 1231, and that both provisions of the statute that allow for that other country are subject to 8 U.S.C. 1231(b)(3), which is the withholding provision.

And we also submit that they cannot be removed unless they have CAT protection.

THE COURT: That's what I thought you were going to say.

Do you disagree with any of that -- that the source of your authority comes from that statute; that the statute limits the authority to countries that would not result in death or torturing; and that that removal is still subject to CAT protections?

MS. LARAKERS: Well, with a slight wrinkle. 1231(b)(3) says they can't be removed to that country that they will face torture if the Attorney General makes a finding. So that's consistent with our pleading. But that is the framework that we'll be talking about today.

THE COURT: Okay. So I want to make sure I -- I've not spent a lot of time on immigration cases, and, obviously, all of you have, and so I want to make sure that I understand

it.

You agree that the source of authority is from the same statute that she was referring to?

MS. LARAKERS: Yes.

THE COURT: That that authority is limited by the subprovision that says you can't knowingly deport someone to a country where they would be killed or tortured?

MS. LARAKERS: Not exactly. It says where the Attorney General has made a finding. So if the Attorney General had made a finding that the individual would be subject to torture in any country, then, yes; the authority to remove to a certain country would be limited by that.

THE COURT: And so -- and that includes the CAT protections, too, then? You understand that the discretionary authority of DHS to remove to a third party is limited? That they cannot remove to a place where they know torture will occur?

MS. LARAKERS: Where the Attorney General has made a finding, yes. It's limited by (b)(3) to the extent that -- (b)(3).

THE COURT: Right. I understand. I just want to make sure I understand the --

MS. LARAKERS: I'm trying to be careful, Your Honor. You understand.

THE COURT: I completely understand.

It seems to me, as I understand it, there are two questions before me.

The first is what process someone is entitled to when a new country is being designated that is not part of their removal order. And I'm going to give you an opportunity to talk about that.

And the second question -- the one I suspect that the Government wants to focus on -- is whether or not I have jurisdiction to hear whether or not the process that's been used is sufficient at all.

Is that a fair summary of the question that's before me?

MS. REALMUTO: Yes, Your Honor.

THE COURT: And then, I guess, finally, if I find that I do have jurisdiction, what order should I issue today?

MS. LARAKERS: Your Honor, I would add one third question, and that's: If this Court has jurisdiction and if some process is required, then what is the remedy that this court should order?

THE COURT: You're one step ahead. That's my next bullet, so, yes. Excellent. Thank you.

With that, I'll -- I've set the table for my own benefit; I'll let you begin however you deem fit.

MS. REALMUTO: Okay. Thank you, Your Honor.

So, as we mentioned before, today we're seeking to

enjoin defendants from continuing to fail to provide plaintiffs and proposed class members with mandatory procedural protections noticed in the opportunity to raise a fear-based claim before DHS deports them to a country that was never designated in their prior proceedings.

And, as Your Honor mentioned, we're not challenging the final removal order and we're not challenging the execution of final removal orders to their countries, rather we're just seeking to enforce the protections that the Government has now twice told the Supreme Court that it provides.

Indeed, just this past Monday, in the *Riley v. Bondi* argument, the Solicitor General's office stated that the Government has authority to deport to a third country, but, I quote, "with the following caveat: We would have to give the person notice of the third country and give them the opportunity to raise a reasonable fear of torture or protection [sic] in that third country."

And so, as I've said --

THE COURT: Can I pause you for one second?

MS. REALMUTO: Yes.

THE COURT: And I'm going to occasionally interrupt you and ask for a quick response -- and don't feel the need to give me a response on everything. I'll give you a full opportunity to be heard at the end.

Her last sentence -- that it is the position of the

Government that to switch the third-party country designation requires that the deportee who is going to be moved be given an opportunity to be told that that third-party designation is going to be changed and an opportunity to be heard as to the dangerousness of that removal -- do you agree that that's the Government's position?

MS. LARAKERS: I don't agree with their characterization of it. The statement was made with regard to required in removable proceedings; so when that individual is before the immigration court. And we're outside of that context here. We're in post-final order.

THE COURT: Given that we're -- does that apply at all? So I understand that they're not asking to go back to immigration.

I don't think you're going to ask me that.

MS. REALMUTO: We are not.

THE COURT: In this posture, where it is the discretionary decision of the department that's changing the third-party designation, does the person who's going to be deported have a right to be informed and be given an opportunity to be heard as to the dangerousness of that third country designation?

MS. LARAKERS: DHS's position is no.

THE COURT: They don't have to be told anything and given no opportunity to be heard?

MS. LARAKERS: DHS's position is no.

THE COURT: Okay. Thank you.

MS. REALMUTO: Plaintiff's position is yes. A strong yes. Because, in order to afford the protections provided by the statute implied in the Convention Against Torture, a person has to be notified of the country to which they are -- the Government is seeking to deport them.

The State Department recognizes some 197 countries. They cannot be guessing what country the Government is seeking to deport them to. The Government is not providing them with notice, and it is not providing them with an opportunity to make their fear-based claim before the immigration court.

And what happened, we think, to Plaintiff O.C.G. illustrates the urgency of the situation. There an immigration judge granted him protection from removal to Guatemala.

He thought he was being released from detention and, two days later, he was put on a bus and deported to Mexico without the Government notifying him or his counsel and without a chance to make his claim of fear of deportation to Mexico based on the fact that he had been raped and held hostage in that country.

THE COURT: I'm familiar with that. The one thing I was somewhat unclear on is that -- I forget if it was in the declaration from O.C.G. or in the initial briefing, but there was an indication that in the immigration proceeding -- that

O.C.G. had raised a credible fear of Mexico, and that had been part of the discussion.

But it was unclear to me -- it was unclear to me what, if anything, the immigration judge had said about it other than -- it was unclear to me what happened there.

So I was given the impression that this had been discussed in front of the immigration court as -- and contemplated that he would be removed to Mexico --

MS. REALMUTO: No. Mexico -- sorry to interrupt.

THE COURT: Straighten me out. Because I very much wanted to know what happened there. I've gotten a sentence about that and I didn't understand what the outcome was.

MS. REALMUTO: So Mexico was never designated as the country of removal. It just so happened that testimony came up, putting the Government on notice that he had been targeted for persecution in Mexico, in those proceedings.

And at the conclusion of the proceedings, after the immigration judge granted him protection to Guatemala, the Government attorney asked, Are you designating Mexico as an alternate country?

And the immigration judge said point-blank, No. It's too late to designate Mexico.

The Government attorney leaves the room, comes back, waives appeal, and then they deport him to Mexico anyway, without any notice or opportunity.

Now, I will say, the Government has put in a declaration claiming that he was told that he was going to Mexico and he said he didn't have a fear.

That, first of all, is complete hearsay because it's by a declarant who didn't talk to him. We would love to depose that person. He happens to be the same person who swore up and down in a 30(b)(6) deposition that the Government has no policy and no obligation to inform people that they're being deported to third countries.

But besides the fact that it's hearsay, it's also just implausible based on what I've just told you about what happened in immigration proceedings. And it contradicts the allegations in the complaint as well as his sworn declaration.

I'd like to move on to the relief that we're seeking and also answer any question the Court has about the jurisdictional bar the Government has raised.

THE COURT: As to the jurisdictional bar, what would be most helpful for me is if I let the Government explain. The crux of their argument is that I'm jurisdictionally barred from hearing the substance at all, and so I'd like to give them an opportunity to present their argument, and then I'll give you an opportunity to respond to it.

MS. REALMUTO: Would you like me to say what relief we're seeking?

THE COURT: Sure.

MS. REALMUTO: We're seeking an order for O.C.G.'s return.

THE COURT: Let me pause you on that. I understand broadly -- the relief that you're seeking, in terms of most of the temporary restraining order, I understand that you want to have an order that people have to be given an opportunity to be heard. That certainly seems -- if I find that I have jurisdiction, that seems like relief that I could offer. Getting O.C.G. back does not. How could I -- how could this Court have authority to do anything about O.C.G., who resides in Guatemala?

MS. REALMUTO: Because the Court has inherent and equitable authority to do so. And that is in *Califano v. Yamasaki*, which is 442 U.S. 682, and *Peacock v. Thomas*, 516 U.S. 349.

I'd also like to mention that this Court, like the First Circuit, could exercise jurisdiction. The First Circuit in two cases has exercised jurisdiction under its equitable authority to order somebody returned who was improperly deported. And those cases are:

Guerra-Castaneda. It's First Circuit, case number 19-1736. The order was issued sua sponte by the First Circuit because they were so troubled by the fact that he had been deported in violation of stay in September, 2019.

And *Paye v. Garland*, Case No. 23-1426 in September --

sorry, July 17, 2024. And, importantly, it's not part of the published opinion in that case, but the Court issued a separate order compelling the Government to return the petitioner in that case. And so --

THE COURT: But how could -- I mean, how could the Government -- how could the United States Government be compelled to return someone who doesn't reside in the United States?

MS. REALMUTO: They do it all the time when the deportation is improper in violation of the stay. They absolutely know how to return somebody. They put them on a flight.

And, when people win their cases at the Court of Appeals, we have arranged for the Government to bring those individuals back.

THE COURT: So I guess I'm going to give you a chance to respond just on this point, because I'm curious what you have to say, but has that ever happened when someone is under an unquestioned -- an order of removal?

So I understand if there's a different scenario where the Board of Immigration Appeals reverses and says, You, in fact, have a right to be here.

I can see that as warranting an order saying you should return. But if you're already under an order of removal, that seems --

MS. REALMUTO: Sure. So we think it's analogous to the fact that there was an impediment to the removal. Because he hadn't been provided with the procedural protections to make that execution lawful.

And so it's no different than when a federal court issues a stay of removal and the Government goes ahead and deports them anyway. The stay means that there was no authority to execute the order. The failure to provide mandatory procedural protections in advance of that deportation means there was no authority to execute that deportation order.

So it is a wrongful deportation, and courts have inherent equitable authority and often exercise it when there has been a wrongful deportation.

THE COURT: Okay. I'm going to let you finish on the rest of the relief you're seeking, but I'll give the Government an opportunity to respond just as to O.C.G., if that's okay.

MS. LARAKERS: It's distinguishable on several points. As Your Honor noted, the fact that there was a stay in the case means that there had already been a finding that the removal order was not valid and was not executable. So that's one difference.

Second, the difference is -- and I would venture to guess that those orders were done by a Court of Appeals in the petition for review process, in the petition for review context, which the Government, as you saw in our pleadings, you

know, concedes that there's jurisdiction here in the Court of Appeals and the BIA through the administrative process.

Without reading the cases, I can't say that for 100 percent certain.

THE COURT: But spit it out. If that's true -- All right. So if this was -- if you're right -- right? -- if your view of the jurisdiction was right and this case was instead raised in the First Circuit, and the First Circuit says the removal of O.C.G. was wrong, could you then be ordered to bring O.C.G. back? Conceding that he would still be subject to an order of removal.

MS. LARAKERS: Yes, Your Honor. There are procedures for that.

THE COURT: Okay. Okay. Thank you.

MS. REALMUTO: Can I just respond to that? Because the *Guerra-Castaneda* case was not a petition for review case. That was an appeal of a District Court's decision in the context of a stay violation. So it's 100 percent on point.

And then, in addition -- let's see. If the Court would like, after the hearing we could provide examples of court orders compelling return.

And, quite frankly, it's the same issue that Judge Boasberg is grappling with the *J.G.G.* case versus Trump, in terms of: The lack of process before deportation has occurred.

And that's an issue that the D.C. Circuit has agreed with him on and affirmed the provisional class cert grant on, and hasn't yet decided the issue of return. But it certainly -- we're talking about one individual here named plaintiff, who was deported under egregious circumstances.

THE COURT: So I would certainly welcome some more briefing on it. I think it is unlikely that I'm going to include O.C.G. in the TRO today, but we have the preliminary injunction which we will schedule at the end of this, which will be in just a couple weeks.

So, to the extent that you want to address this issue, it was not one that was briefed very fulsomely -- because I don't think it was in the front of mind, in terms of what you thought would be considered, and correctly so -- but it is something that I would like some more support for. So, to the extent that you want to add to your briefing, feel free.

MS. REALMUTO: Right.

Well, then, I would most strenuously urge this Court to consider provisionally certifying the class and enjoining the defendants from failing to provide the procedural protections that we're seeking.

Since filing this lawsuit, all of our organizations have been inundated with phone calls and e-mails from attorneys and individuals terrified of re-detention to a third country, of attorneys grappling to figure out if their clients are going

to be deported to a third country without advanced notice and without giving them the opportunity to say that they're afraid, and without giving them time to present their fear-based claim of removal.

And so the provisional certification of the class and the injunction ordering the Government to provide that notice is critical to the ability of thousands of people in this country today to remain in the United States and to have fair process.

THE COURT: Thank you.

You can address whichever matter you would like to go first. I suspect you're most interested in jurisdiction, and I'm very interested in what you have to say.

MS. LARAKERS: Yes, Your Honor. Before I do that -- or, like, related -- my co-counsel here does have a note on the case they cited, *Guerra-Castaneda*, because he's read it and I have not.

MR. SAUTER: Yes, Judge. I've both read it and been involved in that case.

Mr. Guerra-Castaneda is challenging a removal order and then filed a petition order for review with the First Circuit.

The First Circuit entered a stay order on the Friday before the Labor Day holiday. That order was not provided to the Government until the Tuesday after the Labor Day holiday.

And at that point, Mr. Guerra-Castaneda had already been returned to El Salvador in violation of the First Circuit's stay order.

So that stay order was issued as part of the petition for a review process. And the First Circuit did then order the United States to make its efforts to bring Mr. Guerra-Castaneda back to the United States.

THE COURT: But it was only because they inadvertently -- the United States had either inadvertently or negligently failed to pass that order on to the right person. And if that person had been deported in violation of the order that, if it had been properly passed on in a timely way, that wouldn't have happened?

MR. SAUTER: Correct.

THE COURT: Thank you. I appreciate that.

MS. LARAKERS: And that provides a perfect segue into our discussion about Section 1252(g), which is that the only exception that's been recognized here to 1252(g) strictures is when a Court of Appeals has issued a stay order through the administrative process that the Government has, for some reason, not followed or when the final order of removal isn't valid for some reason.

So there's a case, I think, out of the Seventh Circuit, called Madu [phonetic] where there was a genuine concern that the individual who was removed was not the

individual whose name was on the final order of removal.

So the person claimed that, That's not my final order of removal; I don't have one. So that would go to Your Honor's point that you made earlier: There is no valid executable order of removal.

Now, if Your Honor would like, I can provide a general overview of Section 1252 and what it is, because I think it's something very niche to this area of law.

THE COURT: Absolutely.

MS. LARAKERS: Section 1252 was first -- well, there were versions of it, but we're going to start our story in 1996 with IIRAIRA. People say it different ways, but that's how I'm going to say it.

THE COURT: I've only read it, but I'll take your pronunciation.

MS. LARAKERS: And that was done in a response to this claim splitting that was happening all over the place, right? So you have these final orders of removal -- at the time they were called deportation. People were challenging them in habeas courts, in District Courts, and they also were going through the administrative process.

So there was clearly a problem with claim splitting and with multiple courts having jurisdiction over these issues. So Congress enacts Section 1252 which puts all sorts of jurisdictional limits on, primarily, the District Court,

Your Honor, and then also on courts of appeals in all courts.

I'd like to split that up in two boxes: First, you have limitations on District Court review. And then you have limitations on discretionary review.

Here we're really just talking about the limits on District Court review and then how the legal claims and Constitutional claims here can be brought in the administrative process. So we're not really talking about the discretionary portion of 1252 here today.

So moving on to the section that we are talking about. Back in 1996, Congress passes this law. And then yet -- despite the fact that 1252 exists, claim splitting still happens.

What happens is people are bringing in habeas challenges, challenges to their orders of removal, and the habeas courts are like, Well, if there's no clear removal of my habeas jurisdiction, I need to do something here and now because this person is going to be removed.

So Congress goes back in 2005 and makes it very clear: No habeas jurisdiction; no jurisdiction whatsoever.

And then the First Circuit in 2007 addressed all this history and explanation of what 1252 did in 2007. So it gives great background, and that's largely where this background is coming from.

THE COURT: Which case are you talking about?

MS. LARAKERS: That's *Aguilar v. ICE*, Your Honor. That's a First Circuit decision, pretty foundational. The First Circuit doesn't have a lot of case law on, like, this issue, but that's, like, the foundational case.

THE COURT: I've looked at it. Thank you.

MS. LARAKERS: So that's the statutory framework in which we're working.

Here the Government, like, is making two primary arguments under Section 1252. First is under Section 1252(g). And that, straightforward, prevents the District Court from entering orders that would interfere with three discrete actions of DHS, namely here, any action or decision taken to execute a removal order.

And that's what plaintiffs want here. They want this court to interfere, at least temporarily, in the execution of their removal orders to a third country -- which even Plaintiffs concede that authority is given in 1231. They just attested that that authority is limited also by 1231, right?

So -- but fundamentally, what they're asking for is for this Court to temporarily stay the removal of individuals. And that is what every court -- nearly every Court of Appeals has said that the District Court can't do.

And that's even in the face of some real Constitutional and legal challenges. That's in the face of an individual who claimed that they had a fear of return based on

threatening text messages that they had just received the week before.

And the individual claimed, I need a stay of removal or else I'm going to be removed to a country that -- where I'm going to be tortured.

And he asked just for a brief stay of removal so that his claim could work its way up into the PFR, so that he'd get review in the Ninth Circuit. And the District Court said, I don't have jurisdiction over that. And then the Ninth Circuit Court of Appeals, which is has been pretty liberal in this context, said, I don't have jurisdiction over that.

Same thing back in 2020 with the *Hamama* case that we also cited in our brief. They wanted very similar relief -- "I need time to file a motion to reopen because I had no idea that the Government was going to remove me right now." And they claimed that they had real claims, that they had meritorious claims, but they just need the time to make them.

And the District Court said -- well, the District Court said 1252(g) didn't apply and then -- before the Sixth Circuit -- the Sixth Circuit said, 1252 applies. Regardless of the nature or claim.

And so that's what the District Court is left with here: A whole bunch of case law that asserts the same type of claim that Plaintiffs assert here. And, simply, this District Court just doesn't have jurisdiction over that claim.

THE COURT: So the fact that -- I've spent a lot of time looking at those, including both of the cases you just cited. And it seems very clear to me that, if the Department is acting on an order of removal and they're following the orders of removal, you're 100 percent right, which is what, I think, the plaintiffs conceded at the outset -- which is if the order of removal says, Your removal to Mexico, there's nothing that the District Court can do about that.

But I think they're trying to distinguish -- and what I'm struggling to fit into this analysis is -- when you're changing the removal using the discretion that's, admittedly, given within statute to the Department to change to a third country, since I'm not reviewing the removal itself, the document itself -- I'm saying it's valid; I'm not questioning that. I'm just reviewing what's being done with that document -- does that in any way put me outside of the jurisdiction stripping provisions of 1231?

MS. LARAKERS: So yes. And the answer is because of the nature of the type of removal order that Plaintiffs have here. Right?

So even if Plaintiffs have a removal order that, like, prevents them from being removed to a certain country, they still have a removal order that is valid as with regard to every other country unless and until the Attorney General makes a finding that they have -- that they are going to be subject

to torture. So --

THE COURT: So what I'm struggling with is what's the remedy? Now, their named plaintiffs have some unique situations. I'm sure you've read the declarations for their class petition, which offers some more examples, including -- let me spit out an example:

Someone is subject to deportation. They're sitting in custody in Texas. They have an order that says they cannot be deported to El Salvador. They have a claim that would qualify under CAT that they can't go to Mexico. They are told they're going to Mexico at 6:00 a.m. They leave at 6:30, and they're in Mexico at 7 o'clock.

What's the -- what is the remedy for that individual? Knowing -- because I think you conceded, and you can correct me if I'm wrong, but CAT does prohibit the -- in addition to some of the regulations of 1231 itself, prohibit the deportation of someone to a place where they will be killed or tortured.

So in this scenario, where they've changed without giving someone any notice and they're moving to a new country where that person will be killed or tortured, how does the United States live up to its obligations under CAT?

MS. LARAKERS: Well, so it's important to know that CAT is not a self-executing treaty. So whatever relief, whatever plaintiffs are entitled to under CAT, is limited by the regulations and the statutes that we have here.

So I think we're doing what a lot of -- this colloquy is bordering on what courts of appeals have generally, like, warned against, and that's mixing the merits question with the jurisdictional question. And I want to address that first.

So under -- because we have two different jurisdictional stripping statutes here. Right? We have 1252(g), which is really specific to this Court in this context. And then we have (a)(5), (b)(9). And I can talk about the remedies that are available for individuals to get some sort of review.

But when we're talking about 1252(g) and whether 1252(g) applies, Your Honor's line of questioning, if Your Honor were to hold in the way that you've articulated just now, that would be a fundamental problem because that would be tantamount to saying, Well, there's some additional right to judicial review in the District Court. And no court -- the Supreme Court has not held that there's any additional right to judicial review.

So Your Honor's question, What's the remedy? -- there is a remedy here, and I'll explain that. But even if there wasn't, there is no right to further judicial review in the immigration context other than what the statutes provide.

THE COURT: So as a threshold matter, I will tell you you're right: The jurisdictional question precedes the merits question. And I recognize that I can't blend those two, and

I've spent a lot of time struggling with these very complicated jurisdiction-stripping statutes.

But I would very much like to hear the answer. What is the remedy, then? Because the answer can't be "no remedy."

MS. LARAKERS: Well, Your Honor, I think in some limited circumstances -- and I don't think that's here -- it can be. There may not be judicial review. The Supreme Court has never recognized that an alien has a right to judicial review of anything and everything whenever they want.

So aside from that, though --

THE COURT: To be honest, I came out here and the first question I had for you, which I thought you were going to answer differently, was that, in the example of the O.C.G. -- O.S.G.? O.S.G. --

MS. LARAKERS: O.C.G.

THE COURT: O.C.G. Sorry. Not having the names, it doesn't stick in my head as well.

I thought you were going to say, We did give him notice -- and rely on my declaration -- we told him; he said he didn't mind going, and so we sent him off.

That presents a very different question, right, and it doesn't address the jurisdictional question, but, if your position today is that we don't have to give them any notice and we can send them to any country other than the country for which the immigration court has said no, that's a very

surprising thing to hear the Government say.

And so, if that is your -- I want to make sure that I understand your position correctly, that, if the Government is saying, We can deport people to any country that is not prohibited on the notice of removal, and we are not obligated to listen to anything that the deportee has to say about the danger of torture or death that they may face there -- if that's your position, okay. Great. I understand your position.

But I don't want to mischaracterize your position; so that's why I'm saying it back to you, to make sure.

Is your position that the Government can decide right now that someone who is in their custody is getting deported to a third country, give them no notice and no opportunity to say, I will be killed the moment I arrive there, and, as long as the Department doesn't already know that there's someone standing there waiting to shoot him, that that's fine?

MS. LARAKERS: In short, yes.

THE COURT: Okay.

MS. LARAKERS: And that merits argument about O.C.G. That's alternative arguments down the road.

THE COURT: I didn't want to get too far into that because, obviously, I can't resolve it.

MS. LARAKERS: Right. But I will say -- shortly -- that just because that's, like, the legal position doesn't mean

that individuals may not receive some process as O.C.G. did.

I think this goes back to what the removal order says and whether it's valid. And we know that the removal order here is valid and that the removal order allows for removal to a third country because the only thing that the removal order says is that they can't -- if they've been granted CAT relief, which some of them haven't -- says they can't be removed to that third country.

And Plaintiffs don't contest that; they just say that they need notice and opportunity to be heard.

THE COURT: And your position is there is no procedural due process right to someone who has been found removable? There's no due process right to where they're going to be removed to? No procedural due process right applies to people who are being removed to a new country that has not previously been introduced?

MS. LARAKERS: In this context, that's right, Your Honor.

THE COURT: Okay.

MS. LARAKERS: So let's move on to the remedy, 1252(a)(5) and (b)(9), which is separate from 1252(g); so they do have to be addressed separately.

So 1252(a)(5) and (b)(9) is another jurisdictional stripping -- well, it's a jurisdictional-channeling provision, Your Honor. So (g) is a jurisdictional stripping; (a)(5)(b)(9)

channels.

So what does it channel? Judicial review of any law or fact, including constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States.

That's pretty broad. The First Circuit has raised in *Aguilar* that that's very broad. So the First Circuit has also said if the claim can be raised in removal proceedings, (a)(5) and (b)(9) apply.

So let's talk about how they can be raised in removal proceedings. The simple answer is via a motion to reopen, that -- there are a lot of different types of motions to reopen. Essentially, was that allows is for Plaintiffs to make a new claim based on fear of return to a third country.

There are motions to reopen for a change of country conditions. There are motions to reopen sua sponte upon the judge's own motion, but it's a bit of a misnomer because plaintiffs -- even though it's sua sponte motions to reopen, aliens move for that sua sponte all the time, saying: Judge, please exercise your authority here because the situation is exceptional.

So we have a bunch of different types of motions to reopen in the class. There are people who would -- some of them would not be time-barred to bring a statutory motion to reopen, some of them would.

So there are all these procedural rules and mechanisms governing motions to reopen, but what I can say here today is that, generally, the broadest motion to reopen, the one that encompasses basically any one at any time, is this sua sponte motion to reopen, which is -- the regulation says that the BIA or immigration judge at any time can reopen proceedings.

THE COURT: I understand that. But if this happens at 6:00 a.m., that's not really present, right?

MS. LARAKERS: So that goes the other point, Your Honor, and that is that individuals know when they're put in removal proceedings that -- they're given notice in their removal proceedings that they could be returned to a third country.

THE COURT: Understood. But they're not told which third country, right?

MS. LARAKERS: Not necessarily. But they are told. And then, in the I-589 -- which is the application for asylum, withholding removal, CAT -- it asks specifically --

THE COURT: -- which are the alternative countries?

MS. LARAKERS: No, it doesn't say -- it says do you have a fear of return to -- "Are you afraid of being subjected to torture in your home country or any other country to which you may be returned."

THE COURT: And I'm sorry. What document is that in?

MS. LARAKERS: This is the I-589. I can give you my

copy.

THE COURT: I'm sure you have another one.

MS. LARAKERS: I actually don't, but that's really the only thing I need out of it.

THE COURT: I assume they know what this is.

MS. LARAKERS: Yes, they do. Sorry. I should have printed out three. That's my fault.

THE COURT: And this is what is filled out at the very beginning? When you're seeking -- with order of removal.

MS. LARAKERS: Yes.

THE COURT: Okay.

MS. LARAKERS: So it's not like there's no notice, Your Honor. An alien is given notice that third country removal is possible, sufficient that the Government's position is that they should be making that claim then and now and that if at any point in time, while they're in the United States, there's a third country that they have a fear of returning to, they should make that claim here and now.

THE COURT: So this document is done on -- is this done on day one?

MS. LARAKERS: This is how you apply for a withholding of removal -- this is -- when you get put in immigration proceedings, this is what an alien is going to file.

THE COURT: Okay. When I -- and, again, you spend a lot of time in this area and I don't; so forgive me if this is

an obvious question, but I know, because there's case law, about people being removed to third countries that pre-date the last several months. So this is not entirely a new policy, but is the frequency -- can you give me an idea if the frequency has changed in a dramatic way?

Because I suspect that's what they're going to say -- is that this used to be an extraordinarily rare remedy that was never used and so nobody maybe -- I didn't know this. If this was in your briefings, I missed it.

MS. LARAKERS: It wasn't, Your Honor, and that's our fault.

THE COURT: It raises an interesting point to me. Because it seems -- it seems impossible that the United States could be fulfilling its statutory obligations, its treaty obligations, any of its moral obligations by saying, We're going to not give you any opportunity to tell us, if you go to a certain country, that you're going to be killed.

That -- for me -- and I'm not saying that that is what I think, that is certainly what the law says at the moment, but I can't believe that in the United States of America we can say, We can drop you off a plane and you can get shot in the head, and you know full well it's going to happen, and we don't have to care. That doesn't seem like a conclusion I'm likely to get to.

But you raise a different point which is, all right,

we give you an opportunity to say, All right. If you're from Guatemala but you know that there's a gang in El Salvador that's going to kill you as soon as you get off the plane, you've got to tell us. And we're given you an opportunity to tell us.

And so this isn't something that I've given great thought to, and it does -- it seems like a salient point that deserves some consideration.

And so the only caveat is that -- did this ever used to happen before? Or is this so unusual that even an experienced immigration practitioner would not have taken this box seriously?

Or, alternatively, is this something that an experienced -- all of their, sort of, named plaintiffs are represented -- is this something that an experienced immigration practitioner would know? -- that, if you came from Guatemala and you had trouble in Mexico and then you applied for asylum in the United States, they would have listed both of them here?

MS. LARAKERS: Your Honor, I think that depends on the individual circumstance, which gets into a whole thing about why class isn't appropriate here. But it's not just this notice. It's this notice plus the regulatory required notice, which requires, generally, immigration -- the immigration judge to give a notice that they could be returned to a third country

as well.

THE COURT: That's a statutory notice.

MS. LARAKERS: It's a regulatory, about, like, when an individual is given CAT relief. It's, like, Your withholding of removal is only to this country; you could be removed to a third country.

So it's this opportunity, right?

And then there's the opportunity that, like, really kicks in (a)(5) and (b)(9) here, which is that -- that the named plaintiffs have right now, which is that they can file a motion to reopen sua sponte telling the immigration judge: This -- what is happening to me, what is happening right now, is so exceptional -- which Plaintiffs plainly say that this is exceptional -- that this is so exceptional and that the Government is not giving me notice of where I'm going to be removed, but I have fear to assert. And you, Immigration Judge, you, BIA, should reopen my proceedings so I can assert that claim -- or, potentially, require -- try to make a claim requiring the Government to give them notice.

All these claims, they can all be asserted right now. And -- they can all be asserted right now, Your Honor. And so, along with that assertion of claims, they can seek a stay.

THE COURT: Right.

MS. LARAKERS: An emergency stay. And if they're given an emergency stay, then the Government wouldn't be able

to remove them.

So plaintiffs -- that being said, plaintiffs are going to get up and say that there are procedural hurdles to doing that, I'm sure. But those procedural hurdles don't -- that they're going to claim exist don't really make sense with what they've said in this complaint. They're claiming in this complaint that it is a clear constitutional violation, that there are serious constitutional concerns here, that these are exceptional circumstances.

Those are all reasons that they can raise in immigration court before the BIA that make it more likely that they're going to be successful there. And importantly, those procedural hurdles that they raise -- they're like, Oh, an immigration practitioner wouldn't know this, or, I think that we should have done this earlier, all of those things -- those hurdles are merely procedural in nature. They're not jurisdictional in nature; and here this Court is faced with determining whether it has subject matter jurisdiction.

And as between the two, what we have between procedural hurdles and this Court's jurisdiction, it's clear that Congress wanted aliens to pursue the administrative process route first and go there first and go there to get a relief that they seek from this Court.

And that has to be done on an individualized basis, which Congress also clearly preferred through its enaction of

Section 1252(f)(1) prohibiting class-wide relief. All -- the statutory scheme here -- to the extent that Your Honor believes that it points to some additional process being needed, the statutory scheme also points aliens and immigration court -- for that to be done on an individualized basis.

And ultimately, Your Honor -- let's say individuals get removed and they get up to the Court of Appeals and they're finally able to make the alleged exceptional statutory and constitutional arguments that they're making, before a three-judge panel. That three-judge panel can order them to come back.

So -- and all of this can also be done on an expedited basis, can be requested to be done on an expedited basis.

So the crux of the Government's argument is when the Court is faced with procedural hurdles that plaintiffs are going to raise and this Court's jurisdiction, it has to follow what the Congress intended. And Congress could have provided -- easily could have provided additional procedures for removal to the third countries. They didn't. So I think all -- all of the statutes point to: There may be relief available in immigration court.

And that's the crux of our (a)(5) and (b)(9) argument.

THE COURT: Thank you.

I want to stop there because, like, I think -- I didn't know if you wanted us to get into the merits first. I

think they had gotten into the merits, but -- they got into the merits a bit, and then I dragged you into them, away from your jurisdictional argument a little bit. But if I could ask -- I'll turn back to you on the merits argument and let her respond as to the jurisdictional argument.

MS. REALMUTO: I'm going to respond to the jurisdictional argument because, you know, quite frankly, I'm a bit flabbergasted that they're talking about 1252(g) without talking about the seminal Supreme Court decision interpreting 1252(g), which is *AADC v. Reno*, [verbatim] which clearly says, in no unclear terms, that those three discrete actions -- that 1252(g) only bars discretionary actions. It does not bar nondiscretionary actions, which is exactly what we have here and is exactly what the First Circuit interpreted in the case of *Kong v. United States*. That's 62 F.4th 604 ^ [verbatim].

Kong takes on 1252(g) and reaches the conclusion that the Supreme Court reached. And in that case it's very instructive, because that case was a Cambodian man who was challenging his redetention after a final removal order -- in the context of an FTCA claim, but, nonetheless, challenging the lack of procedural -- the lack of probable cause prior to his detention.

And so in *Kong*, I think you want to look at what the First Circuit said because they said that claims that arise after entry of a final removal order -- and in our case they

are after a final order and they arise from DHS's failure to provide mandatory protections -- are not barred by 1252(g).

And in making that analysis, the First Circuit in *Kong* looked at the Supreme Court's definition in *Jennings* with respect to the other provision that they cite, which is 1252(b)(9), which has some -- no jurisdiction over claims "arising from." And they said, That language is not as broad as the Government is reading it to be.

And so the other cases are *Guerra-Castaneda v. U.S.*, which is a D. Mass decision, an FTCA case as well -- 656 F.Supp. 3d 356 -- as well as *Devitri v. Cronin*, 290 F. Supp. 3d 86.

Those are all decisions that came up in *Kong* and -- you know, a First Circuit decision -- that are involving the same type of claims that we have here. And 1252(g) simply does not bar claims that arise after the removal order and claims that involve nondiscretionary issues. And here we have nondiscretionary mandatory protections.

THE COURT: When you say "nondiscretionary," you don't mean the decision to deport someone to the third country? You say the prohibition to not deport someone to a country that is dangerous.

MS. REALMUTO: I apologize. Thank you. The obligation is mandatory, to provide the protections.

THE COURT: Right. It is a discretionary decision to

try and deport someone to a third country. That's squarely within the discretion.

MS. REALMUTO: Correct.

THE COURT: I understand. Thank you. I just wanted to make sure that I understood where you're coming.

MS. REALMUTO: Absolutely. So it's discretionary to decide to do that; it's mandatory to provide protections before you do that.

THE COURT: Right.

MS. REALMUTO: And that mandatory nature comes from the FARRA CAT statute. We talked about that.

With respect to 1252(a)(5) and (b)(9) --

THE COURT: If I could pause you for one sentence, I think she wants to respond on that exact point; so I'm going to give her a chance.

MS. LARAKERS: I think it may be helpful, just so we stay on the same page, to allow me to address that 1252(g) part, and then we can move on to (a)(5), (b)(9).

THE COURT: Sure. Okay.

MS. LARAKERS: So on AADC, if you remember, Your Honor and I, we talked about pre-REAL ID Act. AADC's pre-REAL ID Act. So in the context of AADC, the Supreme Court is looking at a decision where there is, like, broader habeas jurisdiction, and a lot of courts had said that.

Separately, I believe, if Your Honor reads AADC, it

does not support Plaintiff's point. It was written by Justice Scalia, if that gives a hint.

Second, the discretionary versus nondiscretionary issue has been litigated in the Court of Appeals quite a bit.

So, like, 1252(g) doesn't apply when we have a meritorious claim or where we can state a claim that there's been a violation of the law. And that's where Courts went first. And the Courts of appeals have consistently rejected that in all the cases that I cited in my brief.

Kong, moving on to the Kong, the First Circuit decision: That was in the context of an FTCA claim. So the question is --

THE COURT: What's the FTCA?

MS. LARAKERS: The Federal Torts Claims Act.

THE COURT: Okay.

MS. LARAKERS: So we have a very different context in FTCA. And there is a circuit split as to whether an alien who's claiming unlawful removal -- right? You would think that that would fall under 1252(g). You're talking about removal -- whether they can bring that claim of unlawful removal related to damages that they suffered as with regard to that allegedly unlawful removal in an FTCA claim. Not asking for any immigration relief.

THE COURT: That was just seeking financial relief? Damages --

MS. LARAKERS: He had filed a habeas, Your Honor. It's a messy -- it's a messy case. I just wanted to provide that context, though, because there wasn't -- it wasn't strictly an immigration case.

THE COURT: Okay.

MS. LARAKERS: We were talking about the FTCA, and that's what the claims were brought under. And I know the AUSA who handled it. It was a big mess. But that's the context of that decision.

So I think when we're -- I don't think this Court is bound by anything that was set in *Kong* because it was in a very different context and seeking very different relief.

And then, if the Court wants a better discussion about this discretionary versus nondiscretionary dichotomy that Plaintiffs have raised -- and have raised in every circuit court across the country -- it should look at the Courts that have addressed that in the immigration context, which are -- *Rauda* addressed it. *Camarena* addressed it.

The decisions that were cited in the brief, Your Honor, I think a lot of them addressed that discretionary.

That's it.

Oh, and the District Court decisions. Sorry, Your Honor. We disagree with those. The Courts of appeals decisions that addressed the same thing, the same types of claims, have said no; the District Court said yes. The

Government would disagree with the analysis in the District Court decisions because they conflict with the Courts of Appeal decisions.

THE COURT: Thank you.

MS. REALMUTO: With respect to *Kong*, I'm not going to belabor the point, but take a look at page 617 where the First Circuit expressly says that the text of 1252(g) cannot be interpreted differently depending on whether a detention-based challenge is brought as a habeas or an FTCA claim.

And then they cite the Supreme Court's decision in *Clark v. Martinez*, which, as we know, stands for the proposition that a statute can only be interpreted one way; you can't interpret it differently for different types of claims. So I'll leave you with that on 1252(g).

With respect to the Government's position about *Rauda* and *Camarena* and *Silva* and all of those cases, as an initial point all, all of those people were challenging their deportation to the designated country and all of those people were asking the court to hold off because of some discretionary mechanism that it was waiting for the agency to take.

And in *Rauda* and *Hamama* and *Tazu*, they were asking for a discretionary motion to reopen. *Camarena* was waiting for adjudication of a pending application for the provisional -- a discretionary process to play out.

That is not the situation here. We are not asking the

Court to wait for a discretionary process. Our initial position is notice and an opportunity to be heard, is not discretionary.

And I will say that the *J.G.G.* decision that just came down on March 26 at Westlaw, page 28, Note 8, also addresses that point.

THE COURT: I don't think I am familiar were that one. I don't think I'm familiar with that case you just cited. Can you say it again?

MS. REALMUTO: The *J.G.G.* decision is the D.C. Circuit's affirmance of the Judge Boasberg's decision.

THE COURT: Okay. Thank you. I am familiar with it; I didn't remember the name.

MS. REALMUTO: Sorry, there's a lot of acronyms thrown around.

Okay. Now, moving on to the channeling provisions of 1252(a)(5) and (b)(9), you know, I think it's pretty apparent that our claims arise not from the order of removal previously entered but against claims independent from the prior proceeding.

And reliance on the provisions is based on the erroneous presumption that Plaintiffs and class members could somehow raise claims that they're being deprived procedural protections after the removal order, in a petition for review which, by the way, has a 30-day deadline.

And so, in order to file a petition for review, you have to file it within 30 days of your final removal order.

Now, let's take the case of our plaintiff E.F.D. You know, his removal order was issued in 2018, and here he is picked up in 2025. How's he supposed to file a petition for review now? Years after the fact?

And so people who win their protection claims have no cause or motivation to file a petition for review when they win their cases. To do so would just clog the courts with unnecessary filings.

And, finally, I would point out that the Government's position with respect to (a)(5) and (b)(9) also conflicts with the discussion of (b)(9) in *Kong* and the Supreme Court's decision in *Jennings* which said those cases can't go that far.

I'll also point out in 1252(a)(4), I believe, it says a petition for review can only be decided on the administrative record, and the administrative record is the record before the agency at the time of the final removal order; so there's no way to bring a petition for review. And that position just simply doesn't make sense.

I'd like to move on to the remedy, if I may. I mean, I find it remarkable that the Government's position is -- I'll talk about the form in a second, but, staying on the motion to reopen thing, how are they supposed to know where to move to reopen if they don't have notice on where they're supposed to

be deported to?

Not only that, but how are pro se people supposed to know that they're supposed to be able to do that?

And the Government relies on motions to reopen, but there are statutory barriers to those. They have to be filed within 90 days.

And so even a catchall sua sponte motion is not a viable remedy because it is a discretionary motion. It can be denied in the face of constitutional violations. There's limited judicial review of the denial of sua sponte motions -- and that's the First Circuit's decision in *Thompson*. I don't have a cite for you on that.

But also, you, just with respect to this idea that people are supposed to file the motion to reopen, we've had some of the declarations that we've put forward, motions to reopen, denied.

And, in fact, one IJ said, Well, no, it's DHS that's supposed to get involved in designating the country.

DHS has in the past, pre-February 18, on occasion moved to reopen to designate a new country, which is what they're supposed to do. And we've cited case law in the complaint of cases in which -- that Courts have said, This is what you're supposed to do; you're supposed to designate the country.

THE COURT: But you agree they don't have to. I mean,

I know you've cited the District Court case -- I think it was called *Aden* -- where that was what the District Court judge wanted the Department to do.

But you agree that that's not required? The DHS -- even under your proposed preliminary injunction, you're not saying the DHS wants to reopen an immigration proceeding to change the designation? You agree that the statutory provision gives DHS discretion to change the country designation to a third country?

MS. REALMUTO: We do. And we're saying, though, that a meaningful opportunity to raise your protection --

THE COURT: Oh, right. No, I hear you on that. Yes.

I just want to make sure that procedurally you're not saying that -- you're not saying, for example, that the District Court in *Aden* is right, that they have to go back -- the answer here is that DHS's discretion is not cabined by the judgment of the immigration court. They are, without going back to the immigration court, when they have a judgment of removal, able to change the country of designation?

MS. REALMUTO: By asking the -- but if the person says "I have a fear" --

THE COURT: Right. No, I understand.

MS. REALMUTO: -- then they have to move to reopen the proceedings so that the immigration judge can adjudicate that fear claim. Because only the immigration judge can adjudicate

that fear claim.

THE COURT: Oh. I take that back. I didn't understand what you were saying.

So your position is that -- so I understand we have no agreement on what amount of procedural due process, if any, might be required, but yours is saying that you have to give -- your position is that you have to give them both notice and an opportunity to be heard in front of an immigration judge, not just that they raised that fear to the Department itself.

MS. REALMUTO: Correct. That's what our TRO requests as the procedural protection. And, you know, we think that's important because it is the immigration judge that heard the vast majority of class members' claims --

THE COURT: I understand that.

MS. REALMUTO: -- and is the person qualified to make that determination.

But, more importantly, that whatever the immigration judge says about that fear, there is the availability of an appeal to the BIA and ultimately to the Court of Appeals so that people's claims that they are going to be killed or tortured actually get proper review for the agency but also through the federal courts.

THE COURT: Okay. But in your view, the duty to try to reopen --

MS. REALMUTO: -- falls on DHS.

THE COURT: -- falls on DHS, not on the person who's told, We're not sending you to Mexico; we're sending you to Guatemala?

MS. REALMUTO: Right. Because for many people who are pro se, they are not going to have the language skills or the ability or the time to file a motion to reopen.

Motions to reopen, if you want to get them granted, are pretty intense. You have to also show a prima facie case that you're eligible for the relief that you're asking for. And if you have -- you know, you have to prepare that motion to reopen. And that's why the part of the remedy is a meaningful amount of time in order to be able to do that.

But we're getting really into the remedy now, and, you know, I really do want to respond to the Government's point about the --

THE COURT: Sorry. I tend to ask a lot of questions as we go along.

MS. REALMUTO: Please, ask away. I really want to answer your questions.

But about the form, I mean, first of all, I think the language was -- for the case where "you may be returned," right?

THE COURT: It is.

MS. REALMUTO: And so -- but I would point out that the whole point of the designation and the regulations provided

for designations is that the individual knows that is the country that they could be deported to and that the CAT regulations specifically provide -- I think in 8 CFR 1208.17(b)(2), that the designation -- that, even though the Government can change the country, they cannot be deported to a country where they can be persecuted or tortured.

Let's see. What else do I have here? Let's see.

Okay. The other thing is there's no reason for a person in removal proceedings to have to name every single country in the world where they could be persecuted.

If they do, right, what the IJ is supposed to do is assess that fear claim. That could make removal proceedings take years. If a person says, Well, I'm afraid of being deported to any of these countries where I could be persecuted on account of my sexual orientation, for example, what's going to happen?

And the same thing with the motion to reopen thing. Are we going to flood immigration judges with motions to reopen that are speculative? When the person has no idea where they could be deported? That's just going to clog up the immigration system even further.

Oh, oh, also, and to the Government's point, Well, they can seek an emergency stay from the immigration judge -- those are discretionary stays. It's willy-nilly. If the removal is taking place on a weekend, the immigration judge

doesn't have the same kind of court set up that you can get to a court on a Sunday, for example.

THE COURT: Right.

MS. REALMUTO: So the Government can just deport people on a Friday after 5:00, and it's all over.

I think with that, I will sit down, unless the Court has further questions.

THE COURT: Not now, thank you.

MS. LARAKERS: Thank you, Your Honor.

Briefly, on the motion to reopen point, as I said, there are a lot of different motions to reopen, and the biggest bucket is the sua sponte motion to reopen route.

And in BIA decision in the *Matter of J.J.*, it articulated what the standard for that is. And it provides that the IJ should reopen proceedings because it's an extraordinary remedy for exceptional circumstances.

So that's what plaintiffs allege here: That this is an extraordinary circumstance, an exceptional situation where the Government, they allege, has not provided any notice.

So that's first --

THE COURT: Can I ask you on that point -- so whether or not it is extraordinary, I guess, depends on whether this frequently occurs. And so are you able to tell me -- and if you're not, I completely understand that. But is this currently happening frequently? Are people being given very,

very short windows of notice that they're going to be deported to third countries and then being taken to these countries? Or is this still extraordinarily uncommon?

MS. LARAKERS: I don't know the answer to that, Your Honor.

THE COURT: Okay.

MS. LARAKERS: I know that in the past, the case law would suggest that it was --

THE COURT: -- uncommon.

MS. LARAKERS: It was more rare, which goes to the point of maybe that's why there wasn't a written policy, because -- and, in that situation, perhaps DHS -- and I don't know this, but perhaps DHS thought it made more sense to give the procedures that it deemed were adequate in any given situation, which may be more in some situation, may be less in another.

THE COURT: But even if the policy that's embodied in the February 18th or 13th memo is, in fact, being adopted -- that doesn't necessarily lead to the conclusion that it's all happening in the last minute.

So it could be that -- it's certainly imaginable that there are far more deportations to third party countries but you're still giving people several weeks of notice, right?

MS. LARAKERS: Yes, Your Honor. To that point, it's pretty speculative.

THE COURT: Okay.

MS. LARAKERS: And that's, again, what the motion to reopen point -- I told you they would raise procedural hurdles. They did raise those procedural hurdles.

But let's look at the named plaintiffs. They said one of the named plaintiffs was given a report date in September. So I don't see why that individual in the meantime can't file a motion to reopen. I think we'd be in a very different posture here -- or could be in a different posture here -- if plaintiffs had even tried. But as of right now, there is no allegation that they filed that motion to reopen.

And to their point saying that it's all over if they were moved. Not necessarily. As we discussed, the PFR court has just as much legal authority -- absent the jurisdiction that this Court doesn't have. Like, let's assume jurisdiction for the minute -- has the same legal authority to order people back, to provide remedies. So it's not all over. And the emergency stay can be sought at the IJ level, at the BIA level, and at the Court of Appeals level.

And the most salient point on these sua sponte motions to reopen is *Charles v. Garland* -- it's in our brief -- 113 F.4th, 20, where the First Circuit says, yes, sua sponte motions to reopen are discretionary but -- as with the discretionary -- discretion that this Court has -- it's limited to violations of law, to abuse of discretion.

And what Plaintiffs are alleging here -- I don't think that they would concede that if the PFR court or the BIA failed to give them the remedy they asked for -- I don't think that they would concede that that would be an abuse -- that it wouldn't be an abuse of discretion.

THE COURT: I'm not sure I follow that.

MS. LARAKERS: Plaintiffs would certainly claim that, if they weren't given the relief in immigration court that they sought -- that that would be an abuse of discretion.

THE COURT: I understand. Thank you.

MS. LARAKERS: And then, if the PFR Court agrees, they can order that relief.

So let's move on to the merits. I don't have too much to say.

What we stated in our brief, we're in -- we're outside what the statute and the regulations speak to. There are steps that DHS must follow with regard to when it's considering what third country to remove someone to, but -- I think Plaintiffs said -- there's nothing in the statute that directly speaks to this. So we're really in --

THE COURT: When you say, "there are steps," that's only when they say, First, you consider --

MS. LARAKERS: Yes, that's right.

THE COURT: But once you're in step three, which is a and b didn't work, we're on to just pick another one; and

there's no procedures beyond that.

MS. LARAKERS: There's no procedures beyond that. Statutes don't speak to that. As you see, statutes and regulations speak to a lot of other scenarios, not this one. So we're not in the Accardi doctrine world.

So what is DHS required to do outside of that? You know, our position is nothing.

That doesn't necessarily mean that individuals will get no process. Obviously, in the declaration, DHS stated that O.C.G. did get some process.

I think the named plaintiffs here -- at least one individual was told to report in September. So if he came before this Court in September saying that he had filed his motion to reopen, that's process. Right?

So there's all these different levels of process, like, built in that Plaintiffs have already had. It's -- as Plaintiffs contend, it's not nothing.

The I-589 exists; the admonitions made by the immigration court exist; and the motion to reopen process, despite the procedural hurdles plaintiffs raise, exist. And at all levels in that motion to reopen the administrative process, they can position for a stay of removal.

Including ICE, by the way. That's also an option. Not to say that ICE is required, but it's also an option to tell ICE affirmatively: I know you have the authority to

remove me to a third country, but I have a real fear of being returned to this country because of x, y, and z.

And then ICE could decide, oh, well, maybe they put them in additional screening. Maybe they join a motion to reopen depending on the circumstances. I don't know what would happen, but all of this goes to why it's clear Congress wanted these claims brought individually, on an individual basis, and why they should go to immigration court at least first before we get here, and the recognition that the PFR Court has the authority to craft an appropriate remedy.

Moving on to remedies. Assuming for -- assuming this Court were to find that DHS is required to do something more here, the principles laid out in the Administrative Procedure Act, general principles of separation of powers, would dictate that this Court find that there would be a due process interest and that the Court would at least provide DHS an opportunity to come up with some process; and then the Court could judge that process.

So if the Court is going to grant a TRO or a preliminary injunction, it should at least remand to the agency to allow the agency to come up with some sort of process, and then the Court can judge that.

THE COURT: On that point -- and this is something I had just asked her about -- the proposed TRO that they're asking for seems to give the Department a lot of leeway in

terms of how to set out due process. Do you agree with that?

So in case you don't have it in front of you, I'll summarize it, which is: If you're going to move someone to a third country, you have to give written notice that that will occur and then provide a meaningful opportunity for the plaintiffs to submit an application -- some more words, but basically saying, an application to be reconsidered.

So that seems to give the -- that, I agree, I should not -- if I adopt that deal, I'm not going to say what due process is -- you have to provide written notice on an 8 1/2-by-11, you have to give 72 hours, you have to have -- Right?

Those level of detail would be inappropriate for me to even get into. But even their proposed order doesn't seem to require that.

MS. LARAKERS: The word "meaningful" looms large in this context. I think Plaintiffs would admit that they define the word meaningful very different from the way the Government defines the word meaningful, and we do know that just from practice -- that that word meaningful means very different things.

THE COURT: Interesting.

MS. LARAKERS: And we had whole hearings and proceedings based on what -- if you were to issue this, that relief, we would be in court tomorrow. Because we're going to

disagree on that.

So I think it is -- I don't know what Plaintiffs' version of meaningful is, and perhaps they can be asked. But it -- I can guarantee you we don't agree on that.

For example, I don't think -- the Government would -- let's say that the Government proposes -- Your Honor found that DHS was required to do something. Let's say that the Government proposes what was done in O.C.G.'s case: Told him shortly before he was going to Mexico that he was going to be removed to Mexico, which provided him an opportunity to say, I have a fear of return to Mexico.

I don't know whether plaintiffs would agree that that's meaningful. I venture to say that they would not.

So I think the way to go about that is allow the agency to draft a proposal. Perhaps the parties can talk about that, but I think we're starting with this O.C.G. case as an example -- whether that would be enough process.

Okay. And then on the class-wide, Your Honor said that you're not going to issue a class-wide injunction today?

THE COURT: I'm certainly not certifying provisional class. I did not ask you to come prepared to speak about class. You don't need to. That doesn't mean that -- I am considering a broad injunction, but it is not going to be turning on class.

So my intention today is -- I'm going to let you

finish; I'm going to take a couple minutes; I'm going to come back out; I will give you my provisional ruling; I will give you my written ruling by, hopefully, the end of the day if not midday tomorrow.

And then we will come back, hopefully, if it's convenient for everybody, on the 10th to have a full hearing on the preliminary injunction. And at that point, I'll give you an opportunity to address class. So I'm not asking you to address it now.

I do think, while we're on the topic, the two things that I -- the two things that are worth thinking about in terms of what I'm thinking about and in terms of the next hearing are:

You raised some points about the representativeness of the class and that people -- the named plaintiffs are in a different position than perhaps O.C.G. was, for example, on the morning that he was told he was going to Mexico.

So your point that someone right now who has a hearing in September and has representative counsel and is out of custody and knows that they might be moved to a third party might be in a slightly different position than someone who was told, "You're going to Mexico in 30 minutes."

I'm not asking anyone to talk about that. I'm telling you I'm thinking a lot about that. Those two things seem different to me.

And, secondly, what -- that remedy, if there is a remedy -- it would look like. The point that you just made, I agree with: that the Court is not in the first instance the appropriate party to craft, if I find there is procedural due process rights there.

And, whether it is somewhere between -- I'm sure you're right that -- and I don't think I even need to ask you -- that O.C.G.'s level of procedural due process they would disagree with was meaningful, and that what they would ask for, you would, I'm sure, respond with was excessive.

So where do we fall in the middle of those two things is something I'm -- I'm wrestling with how one would deal with that. I'm not asking you to respond further today, but that's, in terms of -- I think whatever I do today it's not going to be terribly transformative in terms of the next two weeks.

And so I share that to say those are the things that I struggle with, and so hopefully you can help me come to the correct conclusion.

MS. LARAKERS: So with that, Your Honor, I don't think we need to address, obviously, class. But we do need to address what they've sought. They've also sought an administrative stay of what they have called, quote/unquote, "the directive," which is the e-mail that they attached to their complaint.

So that directive -- it just speaks to, like -- just

tells officers --

THE COURT: I'm not going to do that.

MS. LARAKERS: Okay.

THE COURT: I'm not doing that today. I'm not telling you I won't consider that for next week. But I'm not -- I agree with you that exactly what a stay would do relative to a directive that seems to be nonbinding isn't totally clear to me. So I'm not doing anything like that.

MS. LARAKERS: It's our position that any relief beyond the named plaintiffs has direct 1252(f)(1) concerns. That's stated in our brief.

And let me make sure I don't have anything else, which I don't think I do.

Oh. Another case that this Court can look at about, like, 1231(b)(2) -- it's cited in our brief -- is *Jama v. ICE*. That's in our brief, just, if this Court wants more background. And I have it printed out here. It just provides more background.

Thank you, Your Honor.

THE COURT: All right. I'll give you the last word.

MS. REALMUTO: Thank you. If I could just respond briefly to a couple of points.

I think we would know what happens if a person asked ICE for the stay -- the same thing that happened to O.C.G.

I think the Court asked, Is this happening frequently?

It is, because of the redetention directive. We, like I mentioned at the outset, are inundated with people who are being redetained and are terrified.

THE COURT: And I can tell you, I've read every one of those declarations. I understand why you gave them to me, and the point is well made.

MS. REALMUTO: Yeah. And two of those declarations -- actually, two or three of them, people did try to file a motion to reopen and it was denied.

And the way that process works is you don't get an automatic stay when you appeal the denial of an IJ motion to reopen. You've got to ask for another discretionary stay before the BIA.

And the decision about the standard for sua sponte reopening: As I mentioned, people with constitutional violations, the agency has held that those are not extraordinary circumstances. It's a totally discretionary motion.

And, again, to look at *Thompson v. Barr*, I think it was, where there's limited judicial review of discretionary decisions.

Also, you can't ask for emergency stay if you have no notice of the country that you are going to be deported. And, certainly, that is happening. People are in detention now being told they're going to be deported to a third country but

have no idea what that country is.

And, finally, with respect to the named plaintiffs, M.M. and D.V.D., you know, that is not the situation for everyone. These are named plaintiffs in a federal court action who have been told to report in September. But there are -- he is representative of all our proposed class members who this Court does have jurisdiction to provisionally certify the class and grant some relief under CAT.

And just with respect to the Government's position, I mean, they don't really address 1252 but in a footnote. And they try to say that what we're asking the Court to do is enjoin 1231, which is covered by 1252(f)(1).

That is not what we're asking for here. And I want to direct the Court's attention to the case that we cited in our brief, *Galvez v. Jaddou*.

The CAT statute is a totally separate statute from the Immigration and Nationality Act. It is the Foreign Affairs Reform and Restructuring Act. It's in a separate statute.

But, most importantly, I would just like to explain that 1252(f)(1) enjoins certain provisions of the Immigration and Nationality Act that were in effect on September 30, 1996, when IIRAIRA enacted that provision.

FARRA, the CAT statute, came about two years later. And the implementing regulations came about afterwards. Therefore, it is not covered by 1252(f)(1), and that is why the

Court has authority to issue injunctive relief to provide CAT protection.

And with that, thank you.

THE COURT: Thank you. I'm going to take a ten-minute recess to put some of my thoughts together, and I'll be back out.

(A recess was taken from 1:25 to 1:42 p.m.)

Thank you all for both your extensive briefing and for the hour and a half you were willing to let me ask you questions here today. I know both of you have a lot more experience in this area than I, and it was very helpful.

I'm issuing a temporary restraining order today. The temporary restraining order that the plaintiffs have sought is granted in part.

The defendants, all of their agents, officers, servants, employees, attorneys, successors, assignees, and persons acting in concert or participation with them are hereby enjoined and restrained from:

Removing the Plaintiffs D.V.D., M.M., and E.F.D. from the United States to a third country -- i.e., any country other than the country designated for removal in their prior immigration proceedings -- unless and until the defendants provide D.V.D., M.M., E.F.D., and their respective counsel with written notice of the third country to which they will be removed;

And until defendants provide a meaningful opportunity for Plaintiffs D.V.D., M.M., and E.F.D. to submit an application for protection, including withholding of removal under 8 U.S.C., Section 1231, subsection (b)(3) and protection under the Convention Against Torture to the immigration court;

And, if such application is filed, until Plaintiffs D.V.D., M.M., and E.F.D. receive a final agency decision on any such application.

In addition, the defendants are enjoined and restrained from removing 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 and until the defendants provide those individuals and their respective immigration counsel, if any, with written notice of the third country to which they will be removed;

And until defendants provide a meaningful opportunity for those individuals to submit application for the Convention Against Torture protection to the immigration court;

And, if any such application is filed, until those individuals receive a final agency decision on any application. That applies to any individual anywhere in the United States.

I find that no security bond is required under Federal Rule of Procedure 65(c).

The order shall remain in effect until the Court rules

on the motion for a preliminary injunction.

As a reminder of the Court's previous order, Dkt. No. 12, remains in effect.

I would like you to come back for a preliminary injunction hearing on --

Ms. Beatty, did we say the 10th?

THE CLERK: The 10th at 11:45.

THE COURT: Are you able to come back on the 10th at 11:45?

MS. REALMUTO: Yes.

MS. LARAKERS: Can I look at my calendar, please?

THE COURT: Of course.

MS. LARAKERS: Yes, Your Honor.

THE COURT: On that day we will be addressing both class certification and the issuance of a preliminary injunction.

In terms of briefing, do you anticipate filing any additional briefing? Or will you be relying on what you've already submitted?

MS. REALMUTO: Just the opportunity to file a reply brief on our class cert and on the -- if the Government is going to respond further on the PI, obviously to the PI as well.

THE COURT: Sure.

Would giving you until the 2nd, that would be -- no,

that's not very long at all. How about to the 4th? Would that be enough time for you to file an opposition to the class certification and any additional briefing you'd like on the opposition to the preliminary injunction.

MS. LARAKERS: I obviously would love more time, Your Honor, but it sounds like it's going to have to be the 4th.

THE COURT: The 4th, I'm sorry, is only a week. But that kicks it back to them; they have only a couple of days.

And a reply brief by the 8th? I recognize that gives you only two work days, but the deadlines are short.

MS. REALMUTO: We'll make it work.

THE COURT: In the meantime, I take your point about the Court ordering what "meaningful" means to heart. And so I would consider a motion to reconsider, if you wanted to narrow what that procedure looked like, or you wanted come to an agreement about what it looked like, or you wanted to tell me, This is what we're defining as meaningful, and I would like you to reconsider and adopt this.

I'm open to all of those things because you raise a very good point. And so, to the extent that the guidance that the Court is giving you is nothing more than a meaningful opportunity and you want some more direction or you want to narrow that with some more specificity, I would welcome a motion to consider.

If you file a motion to consider, I can hear you. I think you're in D.C.; so I can hear you, even by Zoom, within 24 hours.

MS. LARAKERS: Thank you, Your Honor, for that opportunity.

I do want to highlight that, in that motion to reconsider that we may file, we may raise objections to the issuing of a TRO in a nationwide context without a provisional -- without even any certification of a class.

I just had to make sure I made that point.

THE COURT: That's completely understood and I'm happy to deal with that. This is only for ten days; so if you want me to deal with that in between, I'm happy to.

But if this prevents procedural challenges that I've not anticipated, explain them to me, and I'm happy to try to ameliorate that, to the degree that I can.

MS. LARAKERS: No, thank you, Your Honor.

THE COURT: With that is there anything else I can do for you today?

MS. REALMUTO: No, thank you, Your Honor.

THE COURT: Is there anything else I can do for the Government today?

MS. LARAKERS: No, Your Honor. Thank you.

THE COURT: Thank you both. I appreciated the argument.

(Whereupon the hearing was adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I, Jessica Leonard, Certified Shorthand Reporter and Federal Certified Realtime Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter, to the best of my skill and ability.

Dated this 30th day of March, 2025.

/s/ Jessica M. Leonard

Jessica M. Leonard, CSR, FCRR

Official Court Reporter