No. 24A1153

In the Supreme Court of the United States

U.S. DEPARTMENT OF HOMELAND SECURITY ET AL.,

Applicants,

v.

D.V.D. ET AL.,

Respondents.

ON APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

RESPONDENTS' MOTION FOR LEAVE TO FILE SUR-REPLY

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Respondents respectfully request that the Court direct the Clerk to file the attached Sur-Reply responding to new factual contentions raised by the government for the first time in its reply in support of its motion to clarify this Court's June 23, 2025 Order (Reply), filed June 24, 2025. In support, Respondents state as follows:

1. This Court does not consider factual contentions and arguments raised for the first time in a reply brief. *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 140 n.2 (2014).

2. The Reply raises new factual contentions and arguments that warrant this brief response.

3. *First*, the Reply asserts that the eight class members currently detained in Djibouti for reasonable fear interviews—as a remedy for the government's violation of the court's preliminary injunction order when in effect—are similarly situated to the thousands of class members who can no longer benefit from the due process protections the preliminary injunction provided. Reply at 3.

4. *Second*, for the first time in more than three months of litigation, the government in its Reply states that the Solicitor General's Office "has been informed that the State Department has received credible diplomatic assurances from South Sudan that the [noncitizens] at issue will not be subject to torture pursuant to the Convention Against Torture." Reply at 4.

5. *Third*, the government newly asserts that its March 30, 2025 memorandum, which was *enjoined* at the time the government attempted to remove the eight class members to South Sudan, applies retroactively and those individuals were obligated to have raised fear claims in accordance with the particular procedures set forth in that memorandum.

6. Raising such new factual allegations for the first time in a reply brief is improper, and a limited response is necessary to ensure a fair and complete record.

For these reasons, Respondents respectfully submit that their proposed 8-page Sur-Reply would assist the Court in acting on the government's motion to clarify. Respondents respectfully request that the Court direct the Clerk to file their proposed brief, appended hereto, as a Sur-Reply in opposition to that motion.

Respectfully submitted,

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Dated: June 25, 2025

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The government asks this Court to declare that it need not comply with a district court order that provided a remedy for the government's violation of a preliminary injunction. The district court found that the Department of Homeland Security (DHS) violated the preliminary injunction by attempting to send eight class members to South Sudan without affording the due process protections required by the preliminary injunction—protections this Court has since stayed. No court has reversed that finding. Yet, to avoid the legal consequences of violating a federal court order, Respondents advance new legal arguments and assert for the first time that the State Department has received credible diplomatic assurances against torture from South Sudan, a country in a state of internal armed conflict to which the same State Department warns against all travel.

A. Granting the Motion to Clarify Would Expel Eight Class Members to South Sudan and Reward the Government's Violation of Court Orders.

Defendants' reply argues for the first time that the eight men in Dijbouti should be "treated like every other class member," by which they mean that no court-ordered due process protections should apply to them. Reply 3. But "every other class member" was *not* given mere hours' notice of imminent removal to one of the most dangerous countries on the planet at a time when due process protections were mandated by court order. Nor has the government been delaying provision of court-ordered protections to "every other class member" for 35 days.

Notwithstanding Defendants' inappropriate personal attacks on the district court judge, *see* Mot. 5-6; Reply 4-5, and baseless assertions about the court's "lawlessness," Reply 1, it is Defendants who have been "flagrantly disobeying" court orders, Reply 4. Indeed, they do not deny that they *violated a court order*, chose to give these men hours of notice in a life-or-death matter of removal to South Sudan, and elected to hold the men in Djibouti. *See generally* Supp. App. 1a-17a.

Just yesterday, a former high-level official with the Department of Justice's Office of Immigration Litigation filed a protected whistleblower claim alleging that *in this very case*, high-level Department of Justice officials conspired to violate the district court's temporary restraining order (TRO). The disclosure describes, in painstaking detail, efforts to feign ambiguity in an unambiguous order, failing to disseminate the fact and terms of the injunction, and purposefully failing to respond to Plaintiffs' inquiries. *See* Protected Whistleblower Disclosure of Erez Reuveni Regarding Violation of Laws, Rules & Regulations, Abuse of Authority, and Substantial and Specific Danger to Health and Safety at the Department of Justice at 16-21, https://s3.documentcloud.org/documents/25982155/file-5344.pdf.[1]

Defendants similarly attempted to avoid compliance with the district court's remedial order by delaying compliance with the terms of the order for over a month. They now seek to *leverage that delay* to disclaim any responsibility to comply with the district court's order. This Court's stay order already rewards Defendants' violations of the district court's orders and will expel class members—many of whom received final orders of removal long ago and have no counsel—to unbearably dangerous conditions in places like Libya, South Sudan, El Salvador, and other countries. Permitting the government to evade compliance with the district court's remedial order would make a "mockery of judicial proceedings in any sense of the administration of justice" by granting Defendants additional relief beyond what they originally sought here. *Foster v. Illinois*, 332 U.S. 134, 145 (1947) (Rutledge, J., dissenting).

Defendants wrongly assert that the remedial order is "prospective." Reply 2. The order

[1] The whistleblower served for fifteen years under different administrations, including the first Trump Administration and the beginning months of the second Trump Administration—until he was fired for following his duty of candor to the district court in the *Abrego Garcia* litigation. *Id*. at 1-2, 4.

remedies a *past violation* of a court order. *See generally* Supp. App. 1a-17a. This remedial order was left untouched by this Court's stay order as it was not the subject of the government's stay motion; if the government sought to avoid compliance with the district court's remedial order, it should have asked this Court for that relief. It cannot now retroactively claim that it made that ask when the face of the filings demonstrates otherwise.

B. Defendants' Counsel's New Assertion of Credible Diplomatic Assurances from South Sudan Is Unsupported by Any Record Evidence and, Even If True, Fails to Comply with the Law.

Defendants' counsel assert for the first time and without citing to any evidence—much less record evidence--that South Sudan has provided the State Department with credible diplomatic assurances that the eight class members currently in Djibouti "will not be subject to torture" in South Sudan. Reply at 4. They alleged that these satisfy DHS' March 30, 2025 memo on third-country removal, which DHS adopted in the wake of the district court's March 28, 2025 TRO order. *Id*. Neither Plaintiffs, their counsel, class members and their counsel, nor the district court, were aware of *any* diplomatic assurances from any country, let alone South Sudan, prior to the submission of Defendants' reply.

First, counsels' statements are *not* evidence, and "unsupported assertions in [Defendants'] brief do not establish" that such credible diplomatic assurances exist much less comply with the requirements of the law. *I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *see also, e.g.*, *Florida v. Georgia*, 585 U.S. 803, 872 (2018) (Thomas, J., dissenting) ("[S]tatements in briefs are not evidence."); *Bell v. United Princeton Props., Inc.*, 884 F.2d 713, 720 (3d Cir. 1989) ("[S]tatements made in briefs are not evidence of the facts asserted."); *Carrillo-Gonzalez v. I.N.S.*, 353 F.3d 1077, 1079 (9th Cir. 2003) (noting that "the argument of … counsel . . . does not constitute evidence").

Second, absent any actual evidence of lawful diplomatic assurances from South Sudan, Defendants are not entitled to any presumption that they satisfy the law. C*f. United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) (officials do not enjoy a "presumption of regularity" where there is "clear evidence" that they have not "properly discharged their official duties"). W here lives are at stake—immediately those of the eight class members but ultimately thousands of others—the government cannot operate clandestinely and deprive class members of the right to review and rebut those assurances. *See generally* Dist. Ct. Doc. 49.

Such review does not constitute improper "second-guess[ing]" of executive determinations, *Munaf v. Geren*, 553 U.S. 674, 702 (2008), as there are certain minimum threshold requirements that a diplomatic assurance must meet. *See Khouzam v. Att'y Gen.*, 549 F.3d 235, 257 (3d Cir. 2008) ("In fact, beyond the Government's bare assertions, we find no record supporting the reliability of the diplomatic assurances that purportedly justified the termination of [the noncitizen's] deferral of removal."). First, Defendants provide no indication that the alleged diplomatic assurances are individualized as to each of the eight class members. *See* 8 C.F.R. § 1208.18(c)(1) ("The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that *an* alien would not be tortured there if *the* alien were removed to that country." (emphasis added)). Second, the statement fails to demonstrate that one of three designated officials—the Attorney General, Deputy Attorney General, or the DHS Immigration and Customs Enforcement (ICE) Assistant Secretary—independently "determine[d], in consultation with the Secretary of State, whether the assurances are sufficiently reliable" to allow removal consistent with the Convention

Against Torture. 8 C.F.R. § 1208.18(c)(2).[2] Courts "may inquire into the overall [diplomatic assurance] process and whether such assurances, on their own terms, satisfy the Constitution." App. 47a (citing *Khouzam*, 549 F.3d at 259). If the alleged assurances are blanket assurances, as contemplated by the memo, they cannot safeguard against torture by state and non-state actors or chain refoulement; this is especially true given the Department of State's most recent report for South Sudan. *See* Dist. Ct. Doc. 49 at 5-11; Dist. Ct. Doc. 112-2 at 1 (referring to "credible reports of . . . torture or cruel, inhuman, or degrading treatment" by South Sudanese security forces).

There is also no evidence that South Sudan provided any diplomatic assurances at the time DHS removed the eight class members from the United States on May 20. As the district court noted, South Sudan's police spokesperson made public statements disclaiming any knowledge of the specifics of their cases and stating that any non-South-Sudanese "would be investigated and 'redeported to their correct country.'" D. Ct. Doc. 121. Defendants meanwhile indicated they were not aware of the police spokesperson's statement, D. Ct. Doc. 124-2 ¶ 4. None of this is consistent with the South Sudanese government having provided credible diplomatic assurances before Defendants attempted to remove these men to South Sudan. Accordingly, at the time of removal from the United States, Defendants disregarding both the district court's preliminary injunction and their own internal guidance. Even now, their assertion that South Sudan has issued credible diplomatic assurances as to torture, Reply 4, does not satisfy the March memo, which requires that assurances address both the possibility of torture *and* persecution. App. 54a. Counsel's last-minute, unsubstantiated allegations are insufficient to

[2] The ICE Assistant Secretary has replaced the Commissioner of the Immigration and Naturalization Service, who is the third referenced official. *Khouzam*, 549 F.3d at 243 n.7.

guarantee the legality of any removal to South Sudan. The Court should deny the government's motion to clarify and thus, at a minimum, permit the district court to review the alleged diplomatic assurances in the first instance to ensure that they comply with the law.

C. Defendants Newly Raised Argument that Class Members Must Have Affirmatively Stated Fear Prior to the Departure of the May 20, 2025 Flight Is Incorrect.

Defendants ask this Court to disregard that they have not provided the eight class members in Djibouti with even the minimal screening and determination process for withholding of removal and CAT claims set forth in their own guidance, because they now claim that these men did not affirmatively state a fear, as required by the guidance, prior to being placed on a removal flight. Reply at 4; *cf.* App. 54a. But that is incorrect and/or irrelevant for at least three reasons: the memo was not in effect on May 20; the class members have subsequently stated a fear; and, regardless, the class members *did* adequately demonstrate fear prior to the flight's departure.

First, it is indisputable that during the hours-long period between when the eight men were told they faced removal to South Sudan and when they were flown out of the United States, the district court's preliminary injunction was in effect, not DHS' March 30, 2025 memo. *See* App. 51a (requiring Defendants to "provide meaningful opportunity for the [noncitizen] to raise a fear of return for eligibility for CAT protections"); *id.* at 47a (finding Defendants' guidance did not satisfy due process). Only on June 23, 2025, when this Court stayed the preliminary injunction, *see DHS v. D.V.D.*, No. 24A1153, 606 U.S. ___ (S. Ct. Jun. 23, 2025), could the March 30 memo become operative. Class members were not aware of—and were not bound by—the requirement to affirmatively state a fear or otherwise comply with Defendants' March 30 memo at the time of the May 20 flight. It is nonsensical for Defendants to now argue that the memo retroactively applied.

Second, these class members have affirmatively stated their fear of removal to South Sudan. When this Court stayed the preliminary injunction, Defendants were aware of the class members' fear claims. Four of the class members have had full or partial reasonable fear interviews in Djibouti, two more were scheduled for reasonable fear interviews this week, and the remaining two were awaiting the scheduling of reasonable fear interviews. *Cf*. Dist. Ct. Doc. 175 at 4; Dist. Ct. Doc. 175-1 ¶ 9. Moreover, the district court recognized that all class members were entitled to reasonable fear screenings, *see generally* App. 1a-3a; Supp. App. 1a-17a. Indeed, the very point of the motion for a temporary restraining order that Plaintiffs filed on behalf of the men en route to South Sudan was based on a fear of removal to South Sudan. Dist. Ct. Doc. 175. The media has widely reported their fear, *see* Response to Motion to Clarify at 7 (citing articles). Defendants are aware that each of the class members has expressed a fear of removal to South Sudan.

Moreover, even under Defendants' own requirements, the class members adequately expressed fear prior to the departure of the May 20, 2025 flight. Each refused to sign the notice of removal to South Sudan. *See, e.g.*, Supp. App. 6a n.6. Given that a noncitizen's signature on this form is an acknowledgment of service, *not* an agreement to be removed, any fair observer would conclude that these feared being removed to South Sudan and had no understanding of what if anything they could do to stop this. Under Defendants' own regulations, such non-verbal cues must be credited as an expression of fear. *See, e.g.*, Securing the Border, 89 Fed. Reg. 48710, 48740 (Jun. 7, 2024) (stating that fear "can be expressed verbally, non-verbally, or physically").

At a minimum, even under Defendants' own memo, the eight class members must receive fear screenings and determinations. Granting the government's motion would permit them to

avoid compliance with DHS' own guidance and most certainly lead to the persecution, torture, and possible death of the eight men who remain shackled in a shipping container in Djibouti.

CONCLUSION

The Court should deny the government's motion to clarify and uphold the district court's remedial order.

Respectfully submitted,

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