No. 24A

In the Supreme Court of the United States

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

J.G.G., ET AL.

APPLICATION TO VACATE THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; Pamela Bondi, Attorney General of the United States, in her official capacity; Kristi Noem, Secretary of the U.S. Department of Homeland Security, in her official capacity; United States Department of Homeland Security; Madison Sheahan, Acting Director and Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement, in her official capacity; U.S. Immigration and Customs Enforcement; Marco Rubio, Secretary of State, in his official capacity; and the United States Department of State.

Respondents (plaintiffs-appellees below) are J.G.G.; G.F.F.; J.G.O; W.G.H.; and J.A.V.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

J.G.G. v. *Trump*, No. 25-cv-766 (Mar. 15, 2025)

United States Court of Appeals (D.C. Cir.):

J.G.G. v. *Trump*, No. 25-5067 (Mar. 26, 2025)

J.G.G. v. *Trump*, No. 25-5068 (Mar. 26, 2025)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General—on behalf of applicants President Donald J. Trump, et al.—respectfully files this application to vacate the orders issued by the U.S. District Court for the District of Columbia (App., *infra*, 147a-148a). In addition, the Acting Solicitor General respectfully requests an immediate administrative stay of the district court's order pending the Court's consideration of this application.

This case presents fundamental questions about who decides how to conduct sensitive national-security-related operations in this country—the President, through Article II, or the Judiciary, through TROs. The Constitution supplies a clear answer: the President. The republic cannot afford a different choice.

On February 6, 2025, the Secretary of State named Tren de Aragua (TdA) a designated foreign terrorist organization and a specially designated global terrorist group. 90 Fed. Reg. 10,030 (published Feb. 20, 2025). That designation reflected the

President's recognition of the acute danger that TdA presents to our national security. The President has since determined that thousands of members of this designated foreign terrorist organization have illegally "infiltrated" the country, in furtherance of the Maduro regime's "goal of destabilizing democratic nations, * * * including the United States." App., *infra*, 176a.

The President acted swiftly and tasked his Administration with neutralizing TdA. Upon finding that "TdA is undertaking hostile actions and conducting irregular warfare against the territory of the United States both directly and at the direction * * * of the Maduro regime in Venezuela," App., *infra*, 177a, the President invoked his Article II powers, coupled with his authority under the Alien Enemies Act (AEA), 50 U.S.C. 21 *et seq.*, which has long authorized summary removal of enemy aliens engaged in "invasions or predatory incursions" of U.S. territory. After making the requisite AEA findings, the President designated TdA members in the United States as "subject to immediate apprehension, detention, and removal." App., *infra*, 177a.

To protect the country against TdA members engaged in a campaign of terror, murder, and kidnapping, aimed at destabilizing our country, the Administration detained designated TdA members identified through a rigorous process. The government prepared to immediately remove them by plane to El Salvador, which had agreed to detain these foreign terrorists after extensive negotiations. In the President's judgment, swift removal of TdA members was imperative to prevent them from endangering personnel and detainees in U.S. detention facilities and continuing to infiltrate U.S. communities. The United States thus has an overwhelming interest in removing these foreign actors whom the President has identified as engaging in "irregular warfare" and "hostile actions against the United States." App., *infra*, 176a.

Saturday March 15, 2025 thus marked the culmination of weeks of work by

President Trump and his Cabinet, who identified foreign enemies within our borders; invoked a longstanding statutory scheme to combat them; and then negotiated and planned a sensitive national-security operation, in conjunction with a foreign country, to remove them from the United States. As with many sensitive diplomatic and national-security operations, speed was of the essence. See App., *infra*, 160a-161a.

Yet even before the Proclamation's public issuance, the district court halted the imminent removal of five identified plaintiffs (respondents here) without even hearing from the government. App., *infra*, 147a. Hours later, the court enjoined all further removals under the Proclamation of TdA members after hurriedly certifying a putative class of "[a]ll noncitizens in U.S. custody who are subject to" the Proclamation "and its implementation." *Id.* at 148a. That order is forcing the United States to harbor individuals whom national-security officials have identified as members of a foreign terrorist organization bent upon grievously harming Americans. Those orders—which are likely to extend additional weeks—now jeopardize sensitive diplomatic negotiations and delicate national-security operations, which were designed to extirpate TdA's presence in our country before it gains a greater foothold. The government sought immediate relief from the D.C. Circuit, which took the extraordinary step of hearing argument within days and issuing 93 pages of opinions. *Id.* at 1a-93a.

A majority of the D.C. Circuit panel held that the district court's orders, though styled as temporary restraining orders (TROs), are appealable. App., *infra*, 7a-8a (Henderson, J., concurring); *id.* at 73a-75a (Walker, J., dissenting). That majority further agreed that the government faces "irretrievable injury" because the district court's orders enjoining further removals "risk 'scuttling delicate international negotiations'" during the critical juncture when the orders are in effect. *Id.* at 8a (Henderson, J., concurring); see *id.* at 76a (Walker, J., dissenting). Yet a different majority

of the Court nonetheless voted to deny relief. *Id.* at 28a-29a (Henderson, J., concurring); *id.* at 31a-32a (Millett, J., concurring).

That decision cries out for this Court's intervention. Most fundamentally, respondents cannot obtain relief because they brought the wrong claims in the wrong court. They style their claims as exclusively arising under the Administrative Procedure Act (APA). But this Court has held that detentions and removals under the Alien Enemies Act are so bound up with critical national-security judgments that they are barely amenable to judicial review at all. *Ludecke* v. *Watkins*, 335 U.S. 160 (1948). Instead, aliens subject to the AEA can obtain only limited judicial review through habeas. Here, however, respondents not only abandoned their claims for habeas relief below, but also filed this suit in the District of Columbia—not the district of their confinement (the Southern District of Texas). Dismissal should have followed on this basis alone. Yet no majority of the D.C. Circuit resolved that question. Judge Walker's dissent rightly recognized that AEA plaintiffs must seek habeas. App., *infra*, 79a-86a. Judge Millett's concurrence incorrectly blessed APA claims. *Id.* at 63a-65a. But Judge Henderson's concurrence—the deciding vote—inexplicably "*assume*[*d*]" jurisdiction, then refused to decide whether respondents could bring APA claims. *Id.* at 8a, 24a-25a.

On top of that, the district court improperly used class certification to effectively impose a backdoor nationwide injunction against the Proclamation. This Court has held that to certify a class under Federal Rule of Civil Procedure 23, courts must follow rigorous procedures and establish that an ascertainable class shares common issues capable of mass resolution. *E.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011). Yet the district court certified a circular class of "[a]ll noncitizens in U.S. custody" subject to the Proclamation without following any of the usual procedural or

substantive guardrails. App., *infra*, 148a. When it is easier to certify classes of designated foreign terrorists than a garden-variety class action over defective products, something has gone seriously awry. Yet no majority of the D.C. Circuit passed on the question. Judge Walker found it unnecessary after concluding respondents' claims belong in habeas proceedings in Texas. *Id.* at 91a n.86. Judge Millett opined that a "swift class action" is necessary to preserve these aliens' rights. *Id.* at 68a. But Judge Henderson's tie-breaking concurrence declined to "pass on the class action 'fit' of the plaintiffs' claims." *Id.* at 28a, 29a n.9.

Even taking the district court's mistaken view that courts have a broad role to play in interpreting the AEA on its own terms, its orders are unsupportable. The AEA requires the President to make two findings for designated enemy aliens to be summarily removable: here, that TdA members are involved in, threatening, or attempting an "invasion" or "predatory incursion," and that TdA has "infiltrated," and "acts at the direction" of a foreign nation or government. App., *infra*, 176a-177a. The President made both findings based on specific descriptions of TdA's hostile activities and close entwinement with the Maduro regime in Venezuela. *Ibid.* Yet the courts below effectively nullified that determination without engaging with it.

Only this Court can stop rule-by-TRO from further upending the separation of powers—the sooner, the better. Here, the district court's orders have rebuffed the President's judgments as to how to protect the Nation against foreign terrorist organizations and risk debilitating effects for delicate foreign negotiations. More broadly, rule-by-TRO has become so commonplace among district courts that the Executive Branch's basic functions are in peril. In the two months since Inauguration Day, district courts have issued more than 40 injunctions or TROs against the Executive Branch. Whereas "district courts issued 14 universal injunctions against the federal

government through the first three years of President Biden's term," they issued "*15* universal injunctions (or temporary restraining orders) against the current Administration in February 2025 alone." Appl. to Stay Injunction at 6, *Office of Personnel Mgmt.* v. *American Fed. of Gov't Emps.* (No. 24A904). The Framers prized "[e]nergy in the executive" and "[d]ecision, activity, secrecy, and dispatch" as paramount qualities for "good government," *The Federalist No. 70*, at 471, 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)—not the energetic dispatch of injunctions to restrain the President from discharging his paramount duties to the Nation.

STATEMENT

1. Tren de Aragua (TdA) is a transnational criminal organization that originated in Venezuela and has "conducted kidnappings, extorted businesses, bribed public officials, authorized its members to attack and kill U.S. law enforcement, and assassinated a Venezuelan opposition figure." Office of the Spokesperson, Dep't of State, *Designation of International Cartels* (Feb. 20, 2025). The President has found that TdA operates "both within and outside the United States," and that its "extraordinarily violent" campaign of terror presents "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." Exec. Order No. 14,157, 90 Fed. Reg. 8439, 8439 (Jan. 29, 2025). On the first day of his term, the President declared a national emergency to respond to that threat. *Ibid.*

The threat is so acute that on February 6, 2025, the Secretary of State, in consultation with other Cabinet officers, designated TdA a "foreign terrorist organization." 90 Fed. Reg. 10,030 (Feb. 20, 2025). The immigration laws authorize such a designation upon the Secretary's finding that an organization is foreign, engages in "terrorist activity" or "terrorism" or "retains the capability and intent" to do so, and thereby "threatens the security of United States nationals or the national security of

the United States." 8 U.S.C. 1189(a)(1), (d)(4); see *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 9 (2010).

Given that TdA poses a significant threat to national security, government officials at the White House and the Department of State have expended significant efforts engaging in delicate negotiations with foreign governments and representatives in order to remove TdA members from the United States as swiftly as possible. As the Senior Bureau Official within the State Department's Bureau of Western Hemisphere Affairs has explained, high-level government officials—including the Secretary himself—spent weeks "negotiat[ing] at the highest levels with the Government of El Salvador and with Nicolas Maduro and his representatives in Venezuela" concerning those countries' consent to the removal to Venezuela and El Salvador of Venezuelan nationals detained in the United States who are members of TdA. App., *infra*, 156a (Kozak Decl.). Following those "intensive and delicate negotiations," the United States reached arrangements "with these foreign interlocutors to accept the removal of some number of Venezuelan members of TdA." *Id.* at 157a.

2. On March 14, 2025, the President signed a proclamation, which was published on March 15, invoking his authorities under the Alien Enemies Act (AEA), 50 U.S.C. 21 *et seq.*, against members of TdA. See Proclamation No. 10,903 § 1 (Mar. 14, 2025), 90 Fed. Reg. 13,033 (Mar. 20, 2025) (Proclamation) (App., *infra*, 176a-179a). Originally enacted in 1798, the AEA grants the Executive broad power to remove enemy aliens from the United States. For instance, the first sentence of Section 21—the Act's most significant source of authority—provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or

> government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.

50 U.S.C. 21. Section 21's second sentence elaborates on related powers:

> The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

Ibid. The Act's remaining provisions outline procedures for implementing the President's broad authority. Section 22 provides that "an alien who becomes liable as an enemy" but who "is not chargeable with actual hostility, or other crime against the public safety," may be afforded some time to settle his affairs before departing from the United States. 50 U.S.C. 22. Section 23 provides an optional process by which an alien enemy can be ordered removed by a federal court following a complaint, rather than directly by the President. 50 U.S.C. 23; see *Lockington* v. *Smith*, 15 F. Cas. 758, 761 (C.C.D. Pa. 1817) (Washington, J.) (the President can remove alien enemies under the Act without resorting to the Section 23 process). And Section 24 prescribes a role for marshals in implementing removal orders under the Act. 50 U.S.C. 24.

The President's March 14 Proclamation outlines his findings that TdA members meet the statutory criteria for removal under the Alien Enemies Act. The President found that TdA, which "commits brutal crimes" including murder and kidnapping, is "conducting irregular warfare and undertaking hostile actions against the United States." App., *infra*, 176a. The President further found that TdA has "engaged in and continues to engage in mass illegal migration to the United States" as a means of supporting Maduro's goal of "harming United States citizens, undermin-

ing public safety," and "destabilizing" the United States. *Ibid.*; see INTERPOL Washington, *High Ranking Tren de Aragua Fugitive from Venezuela Arrested in Tennessee Thanks to Interpol Collaboration* (Dec. 3, 2024), https://perma.cc/UD2K-EV69 ("Tren de Aragua has emerged as a significant threat to the United States as it infiltrates migration flows from Venezuela."). Indeed, Maduro has welcomed the return to Venezuela of aliens who are TdA members. And the President found that TdA works with the Maduro-sponsored Cartel de los Soles to use "illegal narcotics as a weapon to 'flood' the United States." App., *infra*, 176a.

The President additionally found that TdA and other criminal organizations have taken control over Venezuelan territory, resulting in a "hybrid criminal state." App., *infra*, 176a. Moreover, TdA is "closely aligned with" Maduro's regime in Venezuela, and indeed has "infiltrated" the regime's "military and law enforcement apparatus." *Ibid.* The resulting hybrid state, the President determined, "is perpetrating an invasion of and predatory incursion into the United States," posing "a substantial danger" to the Nation. *Ibid.*

Based on those findings, the President proclaimed that "all Venezuelan citizens 14 years of age or older who are members of TdA, are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies" pursuant to 50 U.S.C. 21. App., *infra*, 177a. Further, "all such members of TdA are" "chargeable with actual hostility against the United States" and "are a danger to the public peace or safety of the United States." *Ibid.*

The Proclamation adds that all such TdA members "are subject to immediate apprehension, detention, and removal." App., *infra*, 177a. To that end, the President directed the Attorney General and the Secretary of Homeland Security to "apprehend,

restrain, secure, and remove every Alien Enemy described" above. *Id.* at 177a-178a. Any such TdA member found within the United States is "subject to summary apprehension." *Id.* at 178a. Aliens apprehended under the Proclamation may be detained until their removal, then may be removed to "any such location as may be directed" by the enforcing officers. *Ibid.* TdA members remain deportable under other authorities, including under Title 8 as members of a foreign terrorist organization or otherwise. 8 U.S.C. 1182(b)(3)(B), 1227(a)(4)(B). But the Proclamation lets the President use a particularly expeditious, statutorily authorized removal method for individuals found to present serious national-security threats under specified circumstances.

4. On Saturday, March 15, respondents—five Venezuelan nationals detained at an immigration detention center in Texas—sued in the United States District Court for the District of Columbia to block the government from removing them under the Proclamation, before the Proclamation was even published. Compl. 1.

Several respondents asserted that they were not members of TdA and were wrongly designated as such, though only three of the five respondents initially pressed that argument. Compl. 3-5. Nonetheless, respondents moved to certify a class of "[a]ll noncitizens who were, are, or will be subject to the Alien Enemies Act Proclamation and/or its implementation." Compl. 12. Captioned "PETITION FOR WRIT OF HABEAS CORPUS," Compl. 1, respondents' complaint asserted that implementing the Proclamation would violate "their right to habeas corpus" and asked for "a writ of habeas corpus." Compl. 21. Respondents also sought relief under the APA, asking for an injunction barring enforcement of the Proclamation as contrary to the AEA, the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and other authorities. Compl. 15-21. Respondents, finally, moved for a TRO "barring their summary removal under the AEA." D. Ct. Doc. 3-2, at 2 (Mar. 15, 2025).

b. Hours after respondents filed their complaint, and without waiting to hear from the government, the district court granted respondents' motion for a TRO and ordered applicants not to "remove any of the individual Plaintiffs from the United States for 14 days absent further Order of the Court." App., *infra*, 147a (3/15/25 Second Minute Order). The government moved to stay the order and filed an appeal.

Later that day, and without waiting for a brief from the government, the district court held a hearing on respondents' motion for class certification. App., *infra*, 147a (3/15/25 Third Minute Order). At that hearing, the government's counsel explained that certification of a nationwide class was not appropriate because (among other reasons) respondents' claims sound in habeas and accordingly must be brought in the district (in Texas) in which they are confined. *Id.* at 165a; see *Rumsfeld* v. *Padilla*, 542 U.S. 426, 435 (2004). In response, the district court inquired whether respondents might want to dismiss their habeas claims. App., *infra*, 169a. Respondents' counsel explained that "if the Court felt like it needed us to dismiss the habeas [claim] in order to issue a classwide TRO, then we are prepared to do that." *Ibid.* The court granted respondents' "motion to dismiss their habeas count" without prejudice. *Ibid.* The court then stated without elaboration that "class certification is warranted under Federal Rule of Civil Procedure 23(a) and 23(b)(2)." *Ibid.*

Turning to the merits, the district court did not question TdA's designation as a foreign terrorist organization or the national-security harms that the President identified, including that TdA is "conducting irregular warfare and undertaking hostile actions against the United States." App., *infra*, 176a. The court nonetheless held that respondents are likely to succeed on their argument that the Act "does not provide a basis for the president's proclamation," under the court's view that the terms "invasion" and "predatory incursion" "really relate to hostile acts perpetrated by en-

emy nations and commensurate to war." *Id.* at 174a. The court found that the balance of the equities favors respondents. *Ibid.*

The district court next addressed the implementation of its order. App., *infra*, 174a. Earlier in the hearing, respondents' counsel had asserted that he believed that flights removing individuals pursuant to the President's Proclamation were scheduled to take off during the hearing. *Id.* at 166a. Toward the end of the hearing, the court then stated that "any plane containing these folks that is going to take off or is in the air needs to be returned to the United States, but those people need to be returned to the United States," including by "turning around a plane." *Id.* at 174a.

c. Shortly after the hearing, the district court issued a minute order (1) provisionally certifying a class of "[a]ll noncitizens in U.S. custody who are subject to the * * * Proclamation * * * and its implementation"; (2) enjoining the Government "from removing members of such class (not otherwise subject to removal) pursuant to the Proclamation for 14 days or until further Order of the Court," and (3) setting a briefing schedule for a Government motion to vacate the TRO. App., *infra*, 148a (3/15/25 Fourth Minute Order). The court's written order did not direct the government to turn around planes. The court's order limits removal only under the AEA; it does not affect the President's authority under the Constitution or under other federal statutes. See *id.* at 26a-27a (opinion of Henderson, J.).

d. The government immediately appealed the court's facial injunction of the Proclamation, and the court of appeals consolidated that appeal with the government's appeal from the initial party-specific injunction. 3/15/25 C.A. Clerk's Order.

On Sunday, March 16, the government filed an emergency motion for a stay pending appeal, and the court of appeals scheduled a hearing for March 24. See 3/16/25 Gov't C.A. Emergency Mot. The same day, the government reported to the

district court that, "based on information from the Department of Homeland Security, * * * some gang members subject to removal under the Proclamation had already been removed from United States territory under the Proclamation before the issuance of this Court's second order." D. Ct. Doc. 19, at 1 (Mar. 16, 2025). The government emphasized, though, that "[t]he five individual Plaintiffs [who] were the subject of the first TRO have not been removed" and remain in detention. *Ibid.* Respondents then accused the government of failing to comply with the court's oral directives and written order. D. Ct. Doc. 21 (Mar. 17, 2025). The government responded that it had complied with the written order "since the relevant flights left U.S. airspace, and so their occupants were 'removed,' before the order issued," and that the court's "earlier oral statements were not independently enforceable as injunctions." D. Ct. Doc. 28, at 1 (Mar. 18, 2025). That compliance dispute remains pending in the district court.

e. On March 17, the government moved in the district court to vacate the nationwide TRO. D. Ct. Doc. 26. On March 24, hours before argument in the D.C. Circuit was scheduled to begin, the district court issued a 37-page opinion denying the government's motion to vacate the TRO and shifting some of its previous rationales. App., *infra*, 94a-130a; see *id.* at 131a. The court first held that it had jurisdiction over respondents' APA claims, rejecting the government's arguments that their challenge could be brought only in habeas in the district of confinement. *Id.* at 111a. The court now explained that respondents "are not limited to habeas relief," because they challenge only their removal and "do not seek release from confinement." *Ibid.*

Turning to the merits, the district court found that respondents are likely to prevail, but changed the grounds. At the oral hearing, the court had opined that the "proclamation is not legal under the AEA." App., *infra*, 174a. In the written denial order, however, the court declined to settle whether "the Proclamation has a legal

basis" in light of the Act's terms. *Id.* at 116a. Instead, the court found that respondents are likely to succeed on their claim that "summary deportation following close on the heels of the Government's informing an alien that he is subject to the Proclamation—without giving him the opportunity to consider whether to voluntarily self-deport or challenge the basis for the order—is unlawful." *Id.* at 123a. The court held that "all class members must be given the opportunity to challenge their classifications as alien enemies, if they wish to do so, before they may be lawfully removed from the United States pursuant to the proclamation." *Id.* at 117a. The court rejected the government's argument that "such judicial inquiry can take place only in a habeas court." *Id.* at 120a. The court opined that there "may well also be independent restrictions on the Government's ability to deport class members—at least to Salvadoran prisons," *id.* at 124a, under the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822, which effectuates implementation of Article 3 of the Convention Against Torture.

The district court further reasoned that respondents are likely to suffer irreparable harm in the Salvadoran detention facilities to which they anticipated being removed. App., *infra*, 129a-130a. By contrast, the court dismissed the government's harms from the TRO as "vague foreign-policy and national-security concerns." *Id.* at 129a. The court thus declined to vacate the initial TRO. *Id.* at 130a.

5. On March 26, the D.C. Circuit issued a 2-1 ruling denying a stay, with each judge writing separately. App., *infra*, 1a. A majority (Judges Henderson and Walker) agreed that the district court's orders are appealable. *Id.* at 8a (Henderson, J., concurring); *id.* at 73a (Walker, J., dissenting). A majority further agreed that the government "risks irretrievable injury" because the district court's orders enjoining further removals "risk 'scuttling delicate international negotiations'" during a critical

juncture. *Id.* at 7a (Henderson, J., concurring) (citation omitted); see *id.* at 90a (Walker, J., dissenting). A different majority nonetheless voted to deny relief. *Id.* at 30a (Henderson, J., concurring); *id.* at 32a (Millett, J., concurring).

Judge Henderson voted to deny the stay. See App., *infra*, 2a-30a. She explained that the district court's orders are appealable because they risk upending international negotiations and they run against the President. *Id.* at 7a (citation omitted); see *id.* at 5a-8a. But she determined that the government had not shown a likelihood of success on the merits. See *id.* at 9a-25a. She "assume[d]" that respondents could properly bring their claims under the APA rather than through habeas, *id.* at 10a (emphasis omitted); rejected the government's reliance on the unreviewability of AEA questions, see *id.* at 11a-17a; and rejected parts of the government's interpretations of the statutory terms "invasion" and "predatory incursion," see *id.* at 17a-24a. Yet she reserved "whether TdA has conducted an 'invasion or predatory incursion' 'against the territory of the United States'"; "whether TDA's conduct is 'perpetrated, attempted, or threatened *by a foreign nation or government*'"; or whether the INA provides " the 'exclusive procedure' for removal and thus eclipse[s] any contrary authority in the AEA." *Id.* at 24a-25a (brackets, citations, and ellipsis omitted).

Judge Henderson also determined that the equities did not support granting a stay. App., *infra*, 25a-28a. Although she had stated in finding the orders appealable that they "threaten[] truly 'irretrievable' harm" by upending "'delicate international negotiations,'" *id.* at 7a (citation omitted), she concluded in analyzing the equities that the government does not face irreparable harm, see *id.* at 25a-27a. Finally, she stated that "what the district court did here was *not* a universal injunction" and that the court instead "followed the Rules of Civil Procedure and certified a class," but she refused to "pass on the class action 'fit' of the plaintiffs' claims." *Id.* at 28a, 29a n.9.

Judge Millett, too, voted to deny a stay. See App., *infra*, 31a-71a. In her view, the district court's orders constitute unappealable TROs. See *id.* at 46a-53a. She rejected the government's argument that most AEA questions are judicially unreviewable under Supreme Court precedent, see *id.* at 55a-62a, and reasoned that this suit could proceed through the APA, not habeas corpus, see *id.* at 62a-68a. Although she did not resolve the merits of respondents' underlying claims, she stated that the Fifth Amendment's Due Process Clause entitles aliens to notice and the opportunity for a hearing before their removal. See *id.* at 32a-34a. She also determined that the equities do not support granting a stay, see *id.* at 68a-70a, and opined that "[o]nly a swift class action[] could preserve [respondents'] legal rights." *Id.* at 68a.

Judge Walker dissented. App., *infra*, 72a-93a. He concluded that the district court's orders are appealable because they "affirmatively interfered with an ongoing, partially overseas, national-security operation." *Id.* at 75a. He determined that the government is likely to succeed on the merits because respondents' suit could properly be brought only through a habeas action in Texas, not through an APA action in the District of Columbia. See *id.* at 78a-91a. He viewed the equities as favoring a stay because the court's orders jeopardize "the status of 'intensive and delicate' negotiations with El Salvador and the Maduro regime in Venezuela." *Id.* at 90a.

6. The district court's TROs are scheduled to expire on Saturday, March 29. See App., *infra*, 147a. The court invited respondents to move to convert the TROs into preliminary injunctions, see *id.* at 131a, but respondents declined and sought to supplement the record, see D. Ct. Doc. 61 (Mar. 26, 2025). At the court's direction, respondents have now moved to extend the TROs by 14 days, D. Ct. Doc. 64 (Mar. 27, 2025), while the preliminary-injunction briefing continues. 3/26/25 Minute Order.

ARGUMENT

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Court may stay or vacate a district order's interlocutory order granting emergency relief. See, *e.g.*, *Trump* v. *International Refugee Assistance Project*, 582 U.S. 571 (2017) (per curiam); *Brewer* v. *Landrigan*, 562 U.S. 996 (2010); *Brunner* v. *Ohio Republican Party*, 555 U.S. 5, 6 (2008). An applicant must show (1) a likelihood of success on the merits, (2) a reasonable probability of obtaining certiorari, and (3) a likelihood of irreparable harm. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," "the Court will balance the equities and weigh the relative harms." *Ibid.* Those factors strongly support relief here.[1]

A. The Government Is Likely To Succeed On The Merits

The government is likely to prevail for multiple reasons. To begin, judicial review under the AEA is exceedingly limited and confined to habeas, the historical basis for individuals to challenge their custody. But respondents, at the district court's urging, App., *infra*, 169a, have dropped their habeas claims, which in any event "must be brought where detainees are held"—for the five individual plaintiffs here, in the Southern District of Texas. *Id.* at 78a (Walker, J., dissenting). Even were the APA available, the court overstepped by certifying a sweeping, nationwide class of all aliens "in U.S. custody who are subject to" the Proclamation "and its implementation." *Id.* at 148a. Finally, the courts below deemed the United States unlikely to succeed on the merits, yet refused to resolve dispositive merits questions, such as whether TdA—an undisputed foreign terrorist organization—is engaged in

[1] The government has applied to "vacate" rather than "stay" the district court's order, though the practical effect of the relief is the same; the traditional stay standard should govern. See Appl. to Vacate Order at 11 n.4, *Bessent* v. *Dellinger*, 144 S. Ct. 338 (No. 24A790).

"predatory incursions" into the United States that trigger the AEA. See *id.* at 23a-24a, 116a. But it is a non sequitur to conclude that the government is unlikely to succeed on the merits while refusing to examine the merits. *Nken* v. *Holder*, 556 U.S. 418, 427 (2009) ("A reviewing court must bring considered judgment to bear on the matter before it" in evaluating the stay factors). By leaving the government's dispositive merits arguments on the cutting-room floor, the court of appeals improperly discounted the government's chances.

1. Judicial review under the AEA is limited to habeas petitions in the place of confinement

To begin, respondents brought the wrong claims to the wrong forum. The AEA buttresses the President's Article II authorities over national security by expressly empowering him to remove alien enemies—a power that this Court has held is largely unreviewable. *Ludecke* v. *Watkins*, 335 U.S. 160, 165-166 (1948). The exception is for habeas claims challenging enemy-alien detention. The government agrees that a cause of action would be available to respondents. But because their "claims sound in habeas," they must be brought where they are held, in Texas. App., *infra*, 78a (Walker, J., dissenting).

a. This Court has long recognized that the President's broad national-security authority under the AEA is generally "not to be subjected to the scrutiny of courts." *Ludecke*, 335 U.S. at 165. The Act grants the President an authority "as unlimited as the legislature could make it." *Id.* at 164 (citation omitted). Drawing from the established English rule that "alien-enemies have no rights, no privileges, unless by the king's special favour, during the time of war," 1 William Blackstone, *Commentaries on the Laws of England* 361 (1765), the Act confers on the President the power to determine which alien enemies are subject to removal. 50 U.S.C. 21; see

Citizens Protective League v. *Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946) ("Unreviewable power in the President" is "the essence of the Act."); 1 Blackstone, *Commentaries* at 252 (aliens are "liable to be sent home whenever the king sees occasion").[2]

The "very nature" of that sweeping authority "rejects the notion that courts may pass judgment upon the exercise of [the President's] discretion." *Ludecke*, 335 U.S. at 164. *Ludecke* thus declined to second-guess the President's power to detain and remove a German alien enemy after World War II fighting ended, explaining that "judges have neither technical competence nor official responsibility" over such "matters of political judgment." *Id.* at 170.

But the AEA does not foreclose all opportunity to test the legality of alien-enemy detention. Individuals may bring habeas claims. *Ludecke* thus acknowledged that "the question as to whether the person restrained is in fact an alien enemy fourteen years of age or older may" be "reviewed by the courts." 335 U.S. at 171 n.17. Detainees may be able to obtain narrow review of "the construction and validity of the statute," but not the merits of the President's discretionary decision whether to detain or remove particular alien enemies. *Id.* at 171. Instead, review is limited to questions like "whether the detainee is an alien, and whether the detainee is among the 'natives, citizens, denizens, or subjects of the hostile nation' within the meaning of the Act." Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 994 & n.196 (1998); see *Ludecke*, 335 U.S. at 171.

Such claims fall within the historical core of habeas. *Ludecke* itself was brought as a habeas action. 335 U.S. at 162-163. Indeed, "the few Alien Enemies Act

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[2] An early American edition of Blackstone recognized the parallels and cited the AEA in a footnote appended to this passage. 2 *Blackstone's Commentaries* 260 & n.28 (St. George Tucker ed., 1803).

cases on the books almost invariably arose through habeas petitions." App., *infra*, 85a (Walker, J., dissenting). That is because the habeas writ historically existed to challenge the lawfulness of "all manner of detention by government officials." *Department of Homeland Security* v. *Thuraissigiam*, 591 U.S. 103, 137 (2020).

The existence of a habeas remedy to challenge the alien-enemy determination forecloses respondents' broader APA claims. Generally, claims at the historical core of habeas may be brought *only* in habeas. See App., *infra*, 87a (Walker, J., dissenting). Thus, the D.C. Circuit has long recognized in an analogous context that "the availability of a habeas remedy in another district oust[s] us of jurisdiction over an alien's effort to pose a constitutional attack on his pending deportation by means of a suit for declaratory judgment." *LoBue* v. *Christopher*, 82 F.3d 1081, 1082 (D.C. Cir. 1996); see *Kaminer* v. *Clark*, 177 F.2d 51, 52 (D.C. Cir. 1949) ("An action for declaratory judgment cannot be substituted for habeas corpus so as to give jurisdiction to a district other than that in which the applicant is confined or restrained."). Moreover, APA review is available only for final agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704. Habeas is an "adequate remedy" and therefore displaces APA review. See App., *infra*, 80a (Walker, J., dissenting); cf. *O'Banion* v. *Matevousian*, 835 Fed. Appx. 347, 350 (10th Cir. 2020) (holding that "habeas actions" provide an "adequate remedy" displacing APA review under Section 704).

b. Those principles foreclose respondents' APA claims. Tellingly, they labeled their complaint a "petition for writ of habeas corpus" and asked the district court to "[g]rant a writ of habeas corpus" to prevent their removal under the AEA. Compl. 1. Though they abandoned their habeas claims to focus on putative APA remedies at the district court's invitation, see App., *infra*, 169a, the court clarified that the basis for its order is to permit respondents to challenge their alien-enemy status.

See *id.* at 118a ("challenges to their factual designations as members of Tren de Aragua"). That is precisely the type of claim that must be brought in habeas. See *Ludecke*, 335 U.S. at 171 n.17; 5 U.S.C. 704.

Habeas claims, however, must be brought only in the district of detention—and that is not where respondents sued. See *Rumsfeld* v. *Padilla*, 542 U.S. 426, 435 (2004). Respondents should have brought habeas claims in the Southern District of Texas. Yet they filed in the District of Columbia. Respondents may not leverage the APA to attack the President's exercise of authority under the Alien Enemies Act in a forum of their choosing. See *Ludecke*, 335 U.S. at 164. The APA is a particularly poor fit given that APA review extends only to "agency action" and not to action "of the President" like the Proclamation. *Franklin* v. *Massachusetts*, 505 U.S. 788, 796 (1992); see App., *infra*, 80a (Walker, J., dissenting).

c. The decisions below disregarded the problem. Indeed, no majority of D.C. Circuit panel rejected the habeas argument. Only Judge Millett concluded that respondents' "claims are not habeas claims and do not sound in habeas." App., *infra*, 63a. By contrast, Judge Walker, in dissent, opined that respondents' claims sound in habeas and must be brought in Texas. *Id.* at 78a. But Judge Henderson—the deciding vote—merely "[a]ssum[ed] habeas relief is no longer sought," then "*assume*[*d*]" that respondents' APA claims "constitute claims they can assert thereunder." *Id.* at 10a. That assumes away the decisive issue: the AEA does not let respondents refashion habeas claims into APA claims. Judge Henderson ducked that question, portraying the government as having "forfeited" this argument by raising it only in cursory fashion on a single page. *Ibid.* That is untrue. The government reiterated across pages of its briefing that respondents' claims sound in habeas. See Gov't C.A. Emergency Mot. 14, 20-21; Gov't C.A. Reply 6-8, 15-16. By sidestepping this key problem,

the court of appeals left the government subject to an injunction that a majority of the panel did not even determine to be jurisdictionally proper.

Judge Millett and the district court's counterarguments lack merit. They reasoned that habeas was not the proper path for review because respondents supposedly seek relief only from removal, not from detention. See App., *infra*, 62a-64a (Millett, J., concurring); see *id.* at 109a-110a (district court order). But the substance of a complaint dictates whether it sounds in habeas. See *Boudin* v. *Thomas*, 732 F.2d 1107, 1111 (2d Cir. 1984). And the substance of respondents' complaint is a challenge to the Executive's legal authority to issue the Proclamation under which they are currently being held. See Compl. 15-20. Such a challenge to the lawfulness of detention authority is a classic habeas claim; the "core" of habeas is as "a remedy for unlawful detention." *Thuraissigiam*, 591 U.S. at 127 (citation omitted). Moreover, the line between detention and removal in the AEA context is a distinction without a difference, because under the statute and the Proclamation, detention is the immediate precursor to removal. 50 U.S.C. 21; App., *infra*, 177a.

Put otherwise, respondents' claims sound in habeas because they aim at undermining the basis of their detention *under the Alien Enemies Act*. Respondents cannot claim otherwise by purporting to attack the collateral consequences of detention under the AEA and the President's Proclamation (namely, their removal). In the state-prison context, a prisoner cannot evade the habeas statutes by bringing claims for other forms of relief (such as damages) that would "necessarily imply the invalidity of his conviction or sentence." *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994). So too, a fugitive cannot prevent extradition through a suit for declaratory relief rather than a habeas action. See *LoBue*, 82 F.3d at 1083. The court in *LoBue* explained that habeas was the appropriate remedy even though the plaintiffs had "not formally

sought a release from custody," because prevailing on their claims would immediately entitle them "to release or a new trial because of the issue preclusion effect of the judgment here." *Ibid.* Here, because respondents are currently being detained pursuant to the AEA, a successful challenge to the lawfulness of their removability under the Act would necessarily imply the invalidity of the basis for their current detention.

Moreover, as Judge Walker explained below, habeas courts have long entertained claims analogous to respondents'. For example, there have been habeas claims challenging transfer between custodial authorities. Judge Walker, for example, highlighted *Kiyemba* v. *Obama*, 561 F.3d 509, 513 (2009), in which the D.C. Circuit described detainees' request for an "order barring their transfer" to another jurisdiction's authorities as a "proper claim for habeas relief." See App., *infra*, 83a. Here, respondents' request to block their "removal" largely focuses on their request not to be transferred to a foreign detention authority. See Compl. 4-6. Indeed, the district court appeared to recognize that respondents are ultimately concerned about their transfer of detention authority rather than their removal, because it concluded that respondents would be irreparably harmed by the conditions of detention facilities in El Salvador upon their removal, not by the removal itself. See App., *infra*, 127a-128a; *Nken*, 556 U.S. at 435. Respondents' claim sounds in habeas.

Judge Millett and the district court erroneously concluded that this Court's decisions in *Thuraissigiam* and *Munaf* v. *Geren*, 553 U.S. 674 (2008), foreclose those arguments. See App., *infra*, 64a, 109a. But *Thuraissigiam* and *Munaf* do not hold that habeas is unavailable whenever an individual purports to want to "stay in detention in the United States" rather than be removed. *Id.* at 64a (Millett, J., concurring). *Thuraissigiam* recognized that habeas was not traditionally available to obtain "authorization" for an asylum-seeking alien "to remain in a country other than his

own or to obtain administrative or judicial review leading to that result." 591 U.S. at 120. Here, respondents' suit could not grant them asylum or a path to remain in the United States; they challenge the lawfulness of an authority under which they are currently being detained. *Munaf* is even less apt. That case involved detainees who were being held by U.S. forces in Iraq until they could be transferred to Iraq's custody so that Iraq could prosecute them for alleged violations of Iraqi law. This Court found that the lower courts had habeas jurisdiction, but because the plaintiffs' efforts to block their transfer to Iraqi custody "would interfere with Iraq's sovereign right to punish offenses against its laws committed within its borders," their claims did "not state grounds upon which habeas relief may be granted." 553 U.S. at 692 (internal quotation marks omitted). *Munaf* is thus inapposite.

The district court, separately erred by concluding in its follow-up order that habeas and APA relief for an Alien Enemies Act claim "may coexist." App., *infra*, 108a (citation omitted). The APA provides otherwise, limiting judicial review under the statute to agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. 704; see pp. 20-21, *supra*. The district court relied on *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956), which held that an alien could choose to challenge an exclusion order under the APA or in habeas. 352 U.S. at 254. But *Brownell* did not involve a claim under the AEA, which broadly "preclude[s] judicial review" other than in habeas. *Ludecke*, 335 U.S. at 164 (citation omitted). And *Brownell* is an especially slim reed to grasp given that Congress soon overruled it by specifying that aliens "may obtain judicial review" of exclusion orders "by habeas corpus proceedings *and not otherwise*." Pub. L. No. 87-301, § 5, 75 Stat. 653 (1961) (emphasis added). This Court's short-lived and now-repudiated embrace of overlapping APA and habeas relief from exclusion in the 1950s in no way justifies the district court's extraordinary

exercise of jurisdiction over claims that may be heard only in habeas and in Texas.

2. At a minimum, the district court could not grant nationwide relief

Even if the district court could review respondents' APA claims, it lacked authority to grant relief to a nationwide class of members of a foreign terrorist organization. The court provisionally certified a class of "[a]ll noncitizens in U.S. custody who are subject to the" Proclamation "and its implementation." App., *infra*, 148a. But that highly truncated class-certification determination was highly improper. The court certified a non-ascertainable class consisting of anyone in U.S. custody who might be subject to the Proclamation—based on allegations by putative class members who claim they do *not* belong to TdA and thus cannot possibly represent a class whose defining characteristic is being subject to a Proclamation directed at TdA members. By awarding relief to an amorphous nationwide class, the court effectively circumvented equitable limitations on universal relief in a sensitive national-security context. If nothing else, this Court should vacate the district court's order granting classwide relief and limit any surviving order to the named plaintiffs only.

a. Starting with procedure, the district court certified a class without conducting the "rigorous analysis" that Federal Rule of Civil Procedure 23 demands. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 (2011). The court provisionally certified a class from the bench, before the government could file a brief in opposition. See App., *infra*, 169a. The court offered only the conclusory statement that "class certification is warranted under Federal Rule of Civil Procedure 23(a) and 23(b)(2)." *Ibid.* The court never explained why the Rule 23(a) factors were satisfied, let alone in writing. See *ibid.* Nor did the court satisfy other procedural requirements of Rule 23, such as the requirement to define "the class claims, issues, or defenses," the re-

quirement to "appoint class counsel under Rule 23(g)," or the requirement to "direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(1)(B), (2).

Those requirements are indispensable: The modern class action already represents an "'adventuresome'" "innovat[ion]" on traditional "equity practice." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613, 617 (1997) (citation omitted); see *Trump* v. *Hawaii*, 585 U.S. 667, 718 (2018) (Thomas, J., concurring). And certified classes not only place pressure on defendants but also have the power to bind absent class members and preclude them from pressing their claims in further litigation. Indeed, due process requires "that the procedure adopted[] fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940). Rule 23 is that procedure, and "courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce." *Amchem*, 521 U.S. at 620. Certifying classes without observing the procedural guardrails violates this Court's instructions; runs the risk of serious errors in certification; and deprives the defendant and absent parties of a meaningful opportunity to object to classwide relief.

For example, in *East Texas Motor Freight Systems Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), this Court reversed class certification where the court of appeals certified a class notwithstanding the plaintiffs' failure to move for class certification, finding it "inescapably clear" that Rule 23's prerequisites were not met. *Id.* at 403. As that case shows, glaring procedural errors often beget glaring substantive ones. Courts of appeals have vacated class-certification orders with far less serious procedural shortcomings and far fewer consequences for the Nation's security than this case presents. Take *Chavez* v. *Plan Benefit Services, Inc.*, 957 F.3d 542, 545, 547, 550 (2020), where the Fifth Circuit held in the context of an ERISA class action that a class certification order that included "about five pages of substantive analysis" had failed "to demon-

strate a rigorous analysis" because it "analyzed Rule 23 superficially." Or *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (1996), where the Ninth Circuit vacated a certification order in a products-liability case that was "brief and conclusory" where "the record simply [did] not reflect any basis" to "conclude that some key requirements of Rule 23 have been satisfied." If district courts may not certify classes based on thin Rule 23 analysis in the contexts of ERISA and products liability, then certifying a circular class of all detained aliens in the United States subject to a sensitive national-security proclamation based on even thinner analysis is beyond the pale.

In sum, "[e]xplanations are necessary; complex certification decisions cannot be made by judicial fiat." *Priddy* v. *Health Care Serv. Corp.*, 870 F.3d 657, 661 (7th Cir. 2017). But judicial fiat aptly describes the court's half-sentence analysis here. App., *infra*, 169a. Indeed, the court granted certification before even defining the class, underscoring its procedural error. See *ibid.* ("So I will certify a class, and the class will be—let's talk about the definition."). That makes this an easy case for vacatur of the court's order of classwide relief.

b. The district court's class-certification decision also exhibits basic substantive defects. Rule 23(a)'s interrelated requirements of commonality, typicality, and adequacy serve to "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *Wal-Mart*, 564 U.S. at 349. In particular, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* at 348-349 (citation omitted).

But here, the district court certified a class of "all noncitizens in U.S. custody who are subject to the proclamation * * * and its implementation." App., *infra*, 174a. The Proclamation applies only to TdA members. *Id.* at 177a. But "all five named Plaintiffs" say they are *not* TdA members. *Id.* at 117a. Plaintiffs who disclaim mem-

bership in a class can hardly be its adequate representatives; "'a class representative must be part of the class.'" *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 156 (1982) (citation omitted); see also *Amchem*, 521 U.S. at 625-626; *East Texas*, 431 U.S. at 407.

The class as defined also includes too much variation to satisfy the Rule 23(a) requirements. Individuals who claim they are not TdA members may be more interested in challenging the procedures used to designate them as such, whereas individuals who are TdA members might be more interested in challenging the President's authority under the Alien Enemies Act. See *Amchem*, 521 U.S. at 626 (plaintiffs suffering illness from exposure to defendant's products could not adequately represent plaintiffs only at risk of future illness). The class as defined also includes aliens already subject to detention and removal under *other* authorities, such as the INA. Cf. App., *infra*, 175a. Such aliens cannot claim to have suffered the same type of injury (if any) as aliens who are removable solely by virtue of the Proclamation.

The problems do not end there: Rule 23(b)(2) states that an injunctive class may be certified if injunctive relief "is appropriate respecting the class as a whole." But whether an alien is a member of TdA; whether he has been given sufficient process; whether he is removable under a different provision of law; and other such questions necessarily are individualized determinations unsuitable for class treatment. Cf. App., *infra*, 80a n.34 (Walker, J., dissenting) (explaining that this "type of challenge is unique to each plaintiff, so it would seem that a class action is a poor vehicle"). As this Court has explained, Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Wal-Mart*, 564 U.S. at 360. And while the availability of a so-called habeas class action remains an open question, see *Jennings* v. *Rodriguez*, 583 U.S. 281, 324 n.7 (2018) (Thomas, J., concurring in part and con-

curring in the judgment); App., *infra*, 91a & n.75 (Walker, J., dissenting), this case presents no opportunity to explore that question since respondents are *not* proceeding in habeas (even though they should be, see pp. 18-25, *supra*).

c. More generally, the grant of classwide relief here reflects a disturbing innovation in the widespread efforts of district judges to "govern * * * the whole Nation from their courtrooms." *Labrador* v. *Poe*, 144 S. Ct. 921, 926 (2024) (Gorsuch, J., concurring). The order here has effectively blocked the Executive from implementing the Proclamation against *anyone* currently in U.S. custody, throughout the entire Nation—and did so on the very day the Proclamation was published. As the government has explained elsewhere, see, *e.g.*, Appl. for Partial Stay at 15-28, 32-35, *Trump* v. *CASA, Inc.* (No. 24A884), universal injunctions that extend to non-parties exceed "the power of Article III courts," conflict with "longstanding limits on equitable relief," and impose a severe "toll on the federal court system." *Hawaii*, 585 U.S. at 713 (Thomas, J., concurring); see *Department of State* v. *AIDS Vaccine Advocacy Coalition*, 145 S. Ct. 753, 756 (2025) (Alito, J., dissenting).

Although as a formal matter the injunctive relief here extends only to parties—namely, class members, cf. *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 (2011)—the deficient class-certification analysis makes this a universal injunction by another name. As Justice Gorsuch observed in a related context, universal relief has the effect of making "class-action procedures * * * essentially irrelevant in administrative litigation. Why bother jumping through those hoops when a single plaintiff can secure a remedy that rules the world?" *United States* v. *Texas*, 599 U.S. 670, 699 (2023) (concurring opinion). Here, the district court went a step further by eliminating the hoops entirely. This Court should not allow over-easy class certification on demand to become the new blueprint for evading equitable and Article III limitations on universal

injunctions. And the backdoor universal injunction is all the more troubling here because its aim is to hamstring the President in responding to a significant national-security threat—an impermissible intrusion on the President's Article II powers.

d. Ironically, the district court's class-certification analysis also does respondents no favors. To avoid a dispositive venue flaw, the court convinced respondents' counsel to abandon the habeas count in their complaint. See App., *infra*, 169a. Even were respondents and the court correct that respondents' claims need not have been brought in habeas, the class treatment here means that absent class members will be bound by any judgment (for better or worse) and might well be precluded from pursuing individualized habeas relief over their detention and removal. Absent class members' rights of action are generally not "extinguishable" that way unless the members "receive notice plus an opportunity to be heard and participate in the litigation," or to remove themselves from the class. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 847 (1999) (citation omitted). True, the court purported to dismiss the habeas count "without prejudice at this point," App., *infra*, 169a, but that count obviously arises from the same transaction, and involves a common nucleus of operative facts, as the non-habeas counts, and thus might well be preclusive in any future litigation. Cf. *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp., Inc.*, 590 U.S. 405, 412 (2020). At a minimum, the risk of such preclusion, and concomitant prejudice to the rights of absent class members, underscores the importance of following the rigorous Rule 23 procedures and the court's glaring error in failing to do so.

e. A majority of the court of appeals did not reach these objections, even though the government raised them below. See C.A. Gov't Emergency Mot. 10, 20-21; C.A. Gov't Reply 15-17. Judge Henderson, most troublingly, seems to have viewed class certification as avoiding impermissible universal relief. See App., *infra*, 28a.

She stated that the district court "followed the Rules of Civil Procedure" in provisionally certifying the class, yet she then declined to pass on whether the class itself is appropriate. *Id.* at 28, 29 n.9. Judge Millett bypassed the propriety of the class certification, except to observe that "[o]nly a swift class action could preserve [respondents'] legal rights." *Id.* at 68a. Judge Walker did not need to reach the issue because of his determinations about habeas jurisdiction, but expressed doubts that respondents' individualized claims could be addressed in a class action and about the propriety of habeas class actions generally. *Id.* at 80a n.34, 91a n.75. But the blatant defects in certifying a putative class of anyone in U.S. custody subject to the Proclamation should alone warrant vacatur of nationwide, classwide relief.

3. The courts below did not address the Proclamation's lawfulness on the merits

Even were the lower courts correct that broader judicial review via the APA were legally permissible, but see pp. 18-25, *supra,* their failure to engage with the critical statutory inquiry dooms their reasoning. Again, the AEA requires the President to make specific findings to trigger his authority to summarily detain and remove enemy aliens, namely that there is "any invasion or predatory incursion" being "perpetrated, attempted, or threatened" by "any foreign nation or government." As the Act contemplates, the President found (1) that TdA is both tied to the Maduro regime and itself has gained control over parts of Venezuelan territory, and (2) that it has engaged in an "invasion" or "predatory incursion" into our country. As a majority of the D.C. Circuit agreed, those findings—if reviewable at all—receive "the requisite deference due the President's national security judgments." App., *infra*, 25a (Henderson, J., concurring); see also *id.* at 90a, 92a (Walker, J., dissenting).

Even if courts could look behind the President's determinations, the President

has properly identified a "predatory incursion" that has been "perpetrated"—*i.e.*, an entry into the United States for purposes contrary to the interests or laws of the United States. See, *e.g.*, *Amaya* v. *Stanolind Oil & Gas Co.*, 62 F. Supp. 181, 189-190 (S.D. Tex. 1945) (noting use of the phrase to describe raids in Texas during hostilities with Mexico in the 1840s that fell short of "invasion"). That fits TdA's described conduct to a T: "TdA is undertaking hostile actions and conducting irregular warfare against the territory of the United States both directly and at the direction, clandestine or otherwise, of the Maduro regime in Venezuela." App., *infra*, 177a.[3]

So too, the President properly found that TdA has "infiltrated" and "acts at the direction" of a foreign nation or government. App., *infra*, 176a-177a. The President has broad discretion in making such determinations. *See Hawaii*, 585 U.S. at 686 ("questionable" whether President's finding subject to any review). The President has determined that TdA bears close, intimate connections with the Maduro regime, and TdA's infiltration of key elements of the Venezuelan state, including military and law enforcement, bring it within the AEA's scope. The Maduro regime coordinates with and relies on TdA to "harm[] United States citizens" and "destabilize democratic nations, * * * including the United States." App., *infra*, 176a. The result is a "hybrid criminal state." *Ibid.* The President acted well within his authority in deeming TdA a de facto arm of the Maduro regime.

Yet the lower courts sidestepped those arguments. The district court's initial TRO did not offer reasoned analysis of the lawfulness of the Proclamation. App.,

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[3] The Proclamation also properly determined that TdA's actions constitute an invasion under the AEA. When the statute was drafted, "invasion" was used to mean a "hostile entrance," 1 John Ash, *The New and Complete Dictionary of the English Language* (1775), and the Proclamation properly establishes the existence of such a hostile entrance here many times over.

infra, 147a. The court subsequently expressed "confiden[ce] that it can—and therefore must, at the appropriate time—construe the terms 'nation,' 'government,' 'invasion,' and 'predatory incursion.'" *Id.* at 115a. But it had already entered sweeping relief before undertaking any such construction.

The D.C. Circuit likewise avoided outcome-determinative questions. Judge Henderson's tie-breaking concurrence explained that courts maintain authority "to interpret the AEA's predicate acts—a declared war, invasion or predatory incursion—or whether such conditions exist," then offered views on what an "invasion" or "predatory incursion" might entail. App., *infra*, 13a-24a. But she then declined to "pass on whether TdA has conducted an 'invasion or predatory incursion' 'against the territory of the United States.'" *Id.* at 24a-25a (quoting 50 U.S.C. 21). She likewise "offer[ed] no view on whether TdA's conduct is 'perpetrated, attempted, or threatened . . . *by a[] foreign nation or government*.'" *Id.* at 25a (quoting 50 U.S.C. 21). But if those "issues not decided" had gone in the government's favor, that would have swung the likelihood-of-success calculus the government's way. Respondents attack the Proclamation as unlawful because the AEA's "preconditions"—*i.e.*, a predatory incursion into the United States by a foreign nation or government—"have not been met." Compl. 15-16. Respondents raised no other objections under Section 21 of the AEA.

4. The orders are immediately appealable

As a majority of the D.C. Circuit panel recognized, the district court's orders were appealable despite being labeled as TROs, not preliminary injunctions. App., *infra*, 7a (Henderson, J., concurring); *id.* at 75a (Walker, J., dissenting). The "label attached to an order is not dispositive." *Abbott* v. *Perez*, 585 U.S. 579, 594 (2018). Instead, "where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Ibid.* (citation

omitted). Otherwise, a district court could "shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions." *Sampson* v. *Murray*, 415 U.S. 61, 86-87 (1974).

The orders in this case are appealable injunctions because they have the practical effect of enjoining the implementation of the President's Proclamation, and they threaten "serious and perhaps irreparable harm if not immediately reviewed." *Abbott*, 585 U.S. at 594. As Judge Henderson recognized, the government has asserted an irreparable injury, because the orders risk "scuttling delicate international negotiations" and may "forever stymie" those negotiations if they remain in place. App., *infra*, 7a-8a. Judge Walker agreed that the court's orders are appealable because they "affirmatively interfered with an ongoing, partially overseas, national-security operation." *Id.* at 75a. Judge Millett disagreed, reasoning that the government can still remove individuals under other authorities and may still be delayed in removing particular individuals based on habeas proceedings. *Id.* at 50a-51a. But courts cannot second-guess the Executive's judgment about national-security risks that way.[4]

B. The Other Factors Support Relief From The District Court's Orders

In deciding whether to grant emergency relief, this Court also considers whether the underlying issues warrant review, whether the applicant likely faces irreparable harm, and, in close cases, the balance of equities. See *Hollingsworth*, 558 U.S. at 190. Those factors support relief here.

1. The questions raised by this case plainly warrant this Court's review.

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[4] Judge Millett also faulted the government for failing to first request a stay from the district court, App., *infra*, 53a-54a, but as Judge Walker explained, there was no need to do so given "the exigent circumstances that made it 'impracticable' to move first in the district court," *id.* at 77a; see Fed. R. App. P. 8(a)(1)(A). Anyway, moving for a stay in the district court would have been futile; the government litigated vacatur of the orders at the district court's invitation. App., *infra*, 148a-150a.

See *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (identifying certworthiness as a stay factor). This is self-evidently no ordinary case. The D.C. Circuit took the unusual step of holding expedited argument nine days after receiving the government's stay application, then issued 93 pages of opinions two days later. This case raises paramount questions about the President's constitutional and statutory authority to protect the Nation against elements of a designated foreign terrorist organization that the President has determined has been "conducting irregular warfare and undertaking hostile actions against the United States," as well as the extent of judicial review of decisions to remove those individuals. App., *infra*, 176a. Such national-security questions are quintessential issues warranting this Court's attention. See, *e.g.*, *Hawaii*, 585 U.S. at 682.

2. The district court's orders irreparably harm the United States' conduct of foreign policy. Indeed, a majority of the D.C. Circuit panel—Judges Walker and Henderson—agreed that the court's orders "threaten[] truly 'irretrievable' harm" to foreign relations, App., *infra*, 7a (citation omitted); see *id.* at 76a, even as Judge Henderson omitted that from the irreparable-harm calculus, *id.* at 26a. "U.S. government officials from the White House and the Department of State"—including the Secretary of State himself—"have negotiated at the highest levels with the Government of El Salvador and with Nicolas Maduro and his representatives in Venezuela in recent weeks for those countries to consent to the removal" of TdA members to those countries. *Id.* at 156a (Kozak Decl.). After "intensive and delicate negotiations," the United States reached arrangements with El Salvador and the Maduro regime "to accept the removal of some number of Venezuelan members of TdA." *Id.* at 157a.

"The foreign policy of the United States would suffer harm if the removal of individuals associated with TdA were prevented." App., *infra*, 157a. "The orders risk

the possibility that those foreign actors will change their minds about allowing the United States to remove Tren de Aragua members to their countries." *Id.* at 90a (Walker, J., dissenting); see *id.* at 7a (Henderson, J., concurring); *id.* at 157a (discussing risk that "foreign interlocutors might change their minds regarding their willingness to accept" TdA members). "Even if they don't change their minds, [the district courts' orders] giv[e] them leverage to negotiate for better terms." *Id.* at 90a (Walker, J., dissenting); see *id.* at 157a (Kozak Decl.) (foreign actors might "seek to leverage" the prevention of TdA members' removals). "These harms could arise even in the short term." *Id.* at 90a (Walker, J., dissenting) (quoting Kozak Decl.).

The district court's orders also cause serious and irreparable harm by blocking the removal of TdA members from the United States based on the Proclamation. The President has determined that TdA's "campaigns of violence and terror in the United States and internationally" "present an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." Exec. Order No. 14,157, 90 Fed. Reg. at 8439. And the Secretary of State has designated TdA as a foreign terrorist organization. See pp. 6-7, *supra*. The government always has a strong interest in the "prompt" execution of removal, *Nken*, 556 U.S. at 436; that interest is "heightened" when "the alien is particularly dangerous," *ibid.*; and it reaches its apex when the aliens belong to a designated foreign terrorist organization.

The record in this case reinforces that point. TdA members in the United States have engaged in criminal activities such as "homicide," "human trafficking," "extortion of human smuggling victims," "burglaries," "narcotics violations," "weapons violations," and "bank fraud." App., *infra*, 159a-160a (Cerna Decl.). ICE databases show that many individuals who have already been removed under the Proclamation had allegedly committed "extremely serious crimes" in the United States, in-

cluding murder and "indecent assault" against "a fourteen-year-old." *Id.* at 161a. Others are "under investigation by Venezuelan authorities for the crimes of aggravated homicide, qualified kidnapping, and illegal carrying of weapons of war"; "under investigation in Venezuela for murder * * * against a victim whose corpse was found inside a suitcase on a dirt road"; and wanted for "kidnapping and rape," "kidnapping for ransom," and "child abduction." *Id.* at 162a-163a. The district court's orders impede the removal of other, similarly dangerous aliens covered by the Proclamation.

"It [i]s critical to remove TdA members subject to the Proclamation quickly," rather than continuing to detain them in ICE facilities. App., *infra*, 160a (Cerna Decl.). In Venezuela, TdA "was able to grow its numbers from the steady prison population and build its criminal enterprise through the extortion of inmates." *Ibid.* TdA also has "authorized its members to attack and kill U.S. law enforcement." *Designation of International Cartels*. "Keeping [TdA members] in ICE custody" poses "a grave risk to ICE personnel," to "other, nonviolent detainees," and to the country. App., *infra*, 160a-161a (Cerna Decl.). "Holding hundreds of members of a designated Foreign Terrorist Organization, where there is an immediate mechanism to remove them, would be irresponsible." *Id.* at 161a.

Judge Millett instead dismissed the government's "asserted injury [a]s actually just a dispute over which procedural vehicle is best"—"individual habeas petitions in Texas" or "this class APA case in Washington D.C." App., *infra*, 69a. But the district court's orders irreparably injure the government by obstructing the removal of members of a designated foreign terrorist organization from the United States. The fact that the district court lacked authority to issue those intrusive orders makes it more, not less, appropriate to grant emergency relief.

Judge Millett also viewed the orders as "creat[ing] no risk to the public" be-

cause "[t]he Executive remains free to take TdA members off the streets and keep them in detention." App., *infra*, 69a. But as explained, TdA has authorized its members to kill U.S. law-enforcement agents, and an ICE official has explained that detaining rather than removing TdA members would pose a grave risk to ICE personnel and to other detainees, particularly as TdA recruits members while in detention. See p. 37, *supra*. Courts should not second-guess those expert judgments. Finally, Judge Millett questioned "whether any of the [respondents] are, in fact, members of TdA." App., *infra*, 69a. But "[a]gency personnel [have] carefully vetted each individual alien to ensure they were in fact members of TdA." *Id.* at 160a (Cerna Decl.) see *ibid.* (discussing the types of evidence that agency officials considered).

3. Vacating the TROs would not cause irreparable harm to respondents. Judge Millett and the district court paint the government as wrongly denying respondents any process via summary removals. See App., *infra*, 40a (Millett, J., concurring); *id.* at 123a (Boasberg, J.). But expedited removals happen under Title 8 within hours of border crossings. 8 U.S.C. 1225(b)(1); see also 42 U.S.C. 265 (public-health expulsions). Aliens are often not entitled to drawn-out procedures to attack immediate removals. See *Thuraissigiam*, 591 U.S. 140-141.

Regardless, the government agrees that respondents *are* permitted judicial review under the AEA—but only through habeas. Respondents "conceded at oral argument [in the D.C. Circuit] that they can seek all the relief in Texas that they have sought in the District of Columbia." App., *infra*, 92a (Walker, J., dissenting). "So requiring them to sue in Texas does not impose on them irreparable harm"—habeas remains available. *Ibid.* "And whatever public interest exists for [respondents] to have their day in court, they can have that day in court where the rules of habeas require them to bring their suit—in Texas." *Ibid.* Respondents have simply refused

to bring habeas suits in Texas, and even dismissed their habeas claims at the district court's invitation, apparently to enable themselves to pursue a nationwide class action that facially challenges the Proclamation. *Id.* at 169a. Indeed, one alien subject to the AEA has sought habeas relief in Texas and has had his removal stayed pending a hearing on his claim. 3/14/25 Minute Order, *Zacarias Matos* v. *Venegas*, No. 25-cv-57 (S.D. Tex.). Nor can respondents brandish imminent removal as enough to tip the scales. "Although removal is a serious burden for many aliens, it is not categorically irreparable." *Nken*, 556 U.S. at 435. Indeed, this Court has found it "plain that the burden of removal alone" does not constitute "irreparable injury." *Ibid.*

Citing extra-record evidence, Judge Millett stated that "the removals under the AEA thus far have been not to [respondents'] home countries, but directly into a Salvadoran jail reported to have a notorious reputation for human rights abuses." App., *infra*, 70a. In appropriate cases, the United States will request confirmation that a country will comply with its international law obligations, including those under the Convention Against Torture. That the United States is unable to divulge sensitive negotiations with El Salvador in the context of how that country will detain dangerous foreign terrorists is no reason for judges to infer that human rights are being jettisoned. Quite the contrary, penalizing the United States for failing to reveal representations by a foreign government regarding how removed TdA members may be treated puts the government to the untenable choice of potentially losing its foreign partners' trust or having courts treat the removals as unconscionable. Anyway, the district court's order is indifferent to *where* respondents are removed, be it El Salvador, their home countries, or elsewhere. Aliens who the President identified as members of a foreign terrorist organization cannot be removed anywhere based on the Proclamation, and must remain here no matter the ensuing risks to public safety.

Finally, Judge Millett expressed concern that, "the *moment* the district court TROs are lifted," the government would "*immediately* resume removal flights" before respondents have an opportunity "to file a [petition for] a writ of habeas corpus." App., *infra*, 70a. But respondents have already had almost two weeks in which to file habeas petitions in Texas. Having opted against the path the law provides, respondents cannot demand that their removal be enjoined until they pursue habeas anew.

C. This Court Should Grant An Administrative Stay

At a minimum, the Acting Solicitor General respectfully requests that this Court grant an administrative stay while it considers the government's submission. The district court's flawed orders threaten the government's sensitive negotiations with foreign powers. And as long as the orders remain in force, the United States is unable to rely on the Proclamation to remove dangerous affiliates with a foreign terrorist organization—even if the United States receives indications that particular TdA members are about to take destabilizing or infiltrating actions. And the court's orders are likely to be extended by another two weeks, based on respondents' recent submissions to the district court. In these circumstances, an administrative stay is warranted while this Court assesses the government's entitlement to vacatur.

CONCLUSION

This Court should vacate the district court's orders. In addition, the Acting Solicitor General respectfully requests an immediate administrative stay of the district court's orders pending the Court's consideration of this application.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

MARCH 2025

APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5067 **September Term, 2024**

1:25-cv-00766-JEB

Filed On: March 26, 2025

J.G.G., et al.,

Appellees

v.

Donald J. Trump, in his official capacity as President of the United States, et al.,

Appellants

Consolidated with 25-5068

BEFORE: Henderson, Millett, and Walker*, Circuit Judges

O R D E R

Upon consideration of the emergency motions for stay, the opposition thereto, the reply, and the Rule 28(j) letters; the amicus brief filed by South Carolina, Virginia, and other states; the motion to participate as amicus curiae filed by Rep. Brandon Gill and the lodged amicus brief; and the motion for leave to participate as amicus curiae filed by State Democracy Defenders Fund and former government officials and the lodged amicus brief, it is

ORDERED that the motions to participate as amicus curiae be granted. The Clerk is directed to file the lodged amicus briefs. It is

FURTHER ORDERED that the emergency motions for stay be denied. Separate concurring statements of Judge Henderson and Judge Millett and a dissenting statement of Judge Walker are attached.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Judge Walker dissents from the denial of the emergency motions for stay.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring statement:

I. BACKGROUND

A. Statutory Background

In 1798, our fledgling Republic was consumed with fear. Fear of external war with France. Fear of internal strife from her sympathizers. And, for the incumbent Federalist party, fear of its chief political rival: the Jeffersonian Republicans. In the summer of 1798, the Federalists decided to kill two birds with one stone. In a series of laws known as the Alien and Sedition Acts, the Federalists granted the administration of President John Adams sweeping authority to expel immigrants, gag the free press and rid themselves of two key pillars of Republican support—immigrant voters and partisan newspapers. At the same time, these laws would purge the country of reviled Jacobin sympathizers.

Under the first of these laws, the Alien Friends Act, the Congress granted the President sweeping power to detain and expel any alien he deemed "dangerous to the peace and safety of the United States." Act of June 25, 1798, ch. 58., 1 Stat. 570. Under the Sedition Act, the Congress made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against" the government, the Congress or the President, "with intent to defame . . . or to bring them . . . into contempt or disrepute, or to excite against them . . . the hatred of the [] people." Act of July 14, 1798, ch. 74, 1 Stat. 596. Both laws were enacted by narrow margins, widely derided as unconstitutional and allowed to lapse once the Federalists were swept from power in the elections of 1800. A third law, the Alien Enemies Act, offered a wartime counterpart to the Alien Friends Act. That law granted the President the power to detain and expel enemy aliens during times of war, invasion or predatory incursion. *See* Act of July

6, 1798, ch. 66, 1 Stat. 577. Unlike its counterparts, the Alien Enemies Act was never questioned by Jefferson or Madison—the de facto leaders of the Republicans—"nor did either ever suggest its repeal." *Ludecke v. Watkins*, 335 U.S. 160, 171 n.18 (1948). On the contrary, the then-Republican minority in the Congress supported its enactment. Perhaps unsurprisingly, it is the only component of the Alien and Sedition Acts that remains law today.

The Alien Enemies Act (AEA) contains two provisions: a conditional clause and an operative clause. The conditional clause limits the AEA's substantive authority to conflicts between the United States and a foreign power. Specifically, there must be (i) "a declared war between the United States and any foreign nation or government, or" (ii) an "invasion or predatory incursion [] perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government," and (iii) a presidential "public proclamation of the event." 50 U.S.C. § 21. If these conditions are met:

> [A]ll natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized . . . to direct . . . the manner and degree of the restraint to which they shall be subject . . . and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found

> necessary in the premises and for the public safety.[1]

Id. Thus, the AEA vests in the President near-blanket authority to detain and deport any noncitizen whose affiliation traces to the belligerent state. A central limit to this power is the Act's conditional clause—that the United States be at war or under invasion or predatory incursion.

B. Factual & Procedural Background

On March 15, 2025, President Donald Trump invoked his authority under the AEA to apprehend, detain and remove "all Venezuelan citizens 14 years of age or older who are members of [Tren de Aragua]" and who are not "naturalized or lawful permanent residents of the United States." Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua (Proclamation), 90 Fed. Reg. 13,033 (Mar. 14, 2025). The Proclamation rests on two key findings.

First, that Tren de Aragua (TdA)—a designated Foreign Terrorist Organization—is conducting an invasion or predatory incursion into the United States. As evidence of these hostilities, the Proclamation cites TdA's "irregular warfare within the country," including its "drug trafficking" and "mass illegal migration to the United States." *Id.*

Second, that TdA is "closely aligned with, and indeed has infiltrated" the Venezuelan government, "including its military and law enforcement apparatus." *Id.* As evidence of these connections, the Proclamation notes that TdA "grew significantly" while Venezuela's Vice President was a state

[1] The original AEA was limited to males over the age of 14 but was amended during World War I to its current version. *See* Act of Apr. 16, 1918, ch. 55, 40 Stat. 531.

governor. *Id.* The Proclamation also asserts that the President of Venezuela, Nicholas Maduro, sponsors a "narco-terrorism enterprise" called Cártel de los Soles. *Id.* Cártel de los Soles in turn "coordinates with and relies on TdA and other organizations" to traffic illegal drugs into the United States. *Id.*

Learning of the President's Proclamation, five Venezuelans in the United States filed a putative class action to enjoin its enforcement. They also filed an emergency application for a temporary restraining order (TRO), alleging that the plaintiffs and class faced "imminent danger of being removed tonight or early tomorrow morning." Mot. for TRO, *J.G.G. v. Trump*, No. 1:25-cv-766 (D.D.C. Mar. 15, 2025), ECF No. 3. Given the exigencies, the district court entered an immediate and *ex parte* TRO to prevent the Executive Branch from deporting any of the named plaintiffs for 14 days. The court conducted a hearing that evening, during which it provisionally certified a class of plaintiffs consisting of all noncitizens *in U.S. custody* who are subject to the Proclamation. It also entered a second TRO to cover the class for a period of 14 days. The government immediately appealed and sought a stay of the TROs pending its appeal of those orders.

II. JURISDICTION

In the ordinary course of litigation, a plaintiff obtains relief only if he secures a final judgment and prevails on the merits. Remedies come at the end—not the beginning—of a suit. But the world sometimes moves faster than the wheels of justice can turn. And waiting for a final judgment can do harm that no remedy can repair. For example, an election deadline may moot a challenge before a court can resolve the merits. *E.g.*, *Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999 (6th Cir. 2006). Or a detainee

might face imminent expulsion before a court can resolve the lawfulness of his transfer. *E.g.*, *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008) (granting a temporary injunction to preserve jurisdiction in a Guantanamo Bay detainee case). In such circumstances, courts need the ability to press pause.

Our legal tradition recognizes this reality with various forms of interim relief. A plaintiff can obtain a preliminary injunction, which (as its name implies) is a preliminary form of relief meant to "preserve the status quo pending the outcome of litigation." *Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969). "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579–80 (2017) (citation omitted). In other words, a preliminary injunction acts to shield the plaintiff "from irreparable injury" and to "preserve[] the trial court's power to adjudicate the underlying dispute." *Select Milk Prods., Inc. v. Johanns*, 400 F.3d 939, 954 (D.C. Cir. 2005) (Henderson, J., dissenting).

Sometimes even a preliminary injunction will not afford the rapid relief necessary to prevent irreparable injury. A preliminary injunction requires weighty considerations, and those considerations must be memorialized with findings of fact and conclusions of law. *See* Fed. R. Civ. P. 52(a)(2). For that reason, courts may enter an even more provisional form of relief: a temporary restraining order. A TRO is "designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction." 11A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2951 (3d ed. June 2024 update). Given the exigencies that often accompany a TRO, a court may enter the order *ex parte* and without notice to the enjoined party. Fed.

R. Civ. P. 65(b)(1). But because the procedural safeguards are threadbare, a TRO may last for no longer than 14 days, although with the possibility of extension "for good cause" or with the consent of "the adverse party." Fed. R. Civ. P. 65(b)(2).

TROs, unlike preliminary injunctions, are not ordinarily appealable. This has a "practical justification," *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *12 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting)—TROs' limited temporal duration means the juice is often not worth the squeeze—but also a formal one: appellate courts have jurisdiction to review "final decisions of the district courts" only, with certain narrow exceptions. 28 U.S.C. § 1291. One such exception is for "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). That is why a preliminary injunction—although not final—is subject to appellate review. But no such exception exists for TROs. *See Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps.*, 473 U.S. 1301, 1303–05 (1985); *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978) ("The grant of a [TRO] . . . is generally not appealable.").

Nevertheless, in certain limited circumstances, courts have treated TROs as appealable orders. A TRO that threatens truly "irretrievable" harm—that is, harm that cannot be rectified on future appellate review—may be appealed. *Adams*, 570 F.2d at 953.

The government asserts two theories of jurisdiction. We need not decide the first because the second tips this case over the jurisdictional line. The government argues that the TROs risk "scuttling delicate international negotiations" and "may [] forever stymie[]" those negotiations if allowed to remain in

place "even temporarily." Gov't Br. 9; *see also id.* at 12 (warning that "once halted, [deportations] have the significant potential of never resuming"). In an accompanying affidavit, the government alleges that it has negotiated time-sensitive agreements with the governments of El Salvador and Venezuela to accept certain Venezuelan nationals subject to the challenged executive order. *See* Kozak Decl. at 1 ¶ 2. If true, those allegations establish that the government risks irretrievable injury and thus that we may exercise appellate jurisdiction. Granted, the government does not specify why a two-week interlude would dismantle the agreements—it notes only that "foreign interlocutors *might* change their minds," *id.* at 2 ¶ 4 (emphasis added)—but in assessing our jurisdiction, we assume these claims to be true. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

One additional factor tips this case over the jurisdictional line. The district court entered two injunctions against all named defendants—including the President of the United States. Equity "has no jurisdiction . . . to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). Nor does the Administrative Procedure Act (APA) authorize relief against the President. *See Dalton v. Specter*, 511 U.S. 462, 469 (1994). Although injunctions against executive officials are routine and proper, "injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows." *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Whatever the merits (or lack thereof) of the government's claims, an injunction against the President is reason enough to exercise jurisdiction.

III. THE STAY FACTORS

Before granting a stay pending appeal, we consider (1) the applicant's likelihood of success on the merits; (2) whether the applicant faces irreparable injury absent a stay; (3) whether a stay will substantially injure the other parties; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

A. Likelihood of Success

The government raises three arguments for why it is likely to succeed on the merits. First, the district court lacked jurisdiction to hear the case. Second, the political question doctrine bars consideration of the issues raised in this suit. Third, its conduct is lawful under the plain text of the Alien Enemies Act.

1. The District Court's Jurisdiction

The government argues that plaintiffs sued in the wrong venue because their habeas claims could be heard only in the federal district where they are detained. A habeas remedy runs against the immediate custodian of a detainee—"the person who holds [the detainee] in what is alleged to be unlawful custody." *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494–95 (1973). Ordinarily, the immediate custodian "is the warden of the facility where the prisoner is being held." *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004). A habeas suit against the custodian must be brought in the detainee's "district of confinement," which "[b]y definition" is the same district in which the immediate custodian resides. *Id.* at 444. This is the only district where "jurisdiction lies." *Id.* at 443; *see also id.* at 434 n.7 (noting that jurisdiction has a specific meaning in the habeas statute); *id.* at 451–52 (Kennedy, J., concurring) (explaining the rule is "not jurisdictional in the sense of a limitation on subject-matter jurisdiction" but is instead "a

question of personal jurisdiction or venue"). The five named plaintiffs are currently detained at the El Valle Detention Center, Compl. ¶¶ 9–13, which is in the Southern District of Texas. For habeas relief, then, they must sue the warden of the Valle Detention Center in the U.S. District Court for the Southern District of Texas.[2]

Plaintiffs initially challenged the lawfulness of the Proclamation under the APA and sought various forms of relief, including a writ of habeas corpus. Compl. at 21. But they quickly abandoned their habeas claims and no longer contest their confinement, only their detention. *Cf. Rumsfeld*, 542 U.S. at 439 (explaining that habeas' geographic limits have "no application" when plaintiffs are "not challenging any present physical confinement"); *Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946) (hearing AEA challenge outside of habeas). The government's second brief omits any discussion of proper venue and instead contains a conclusory assertion that the district court lacked jurisdiction because "these claims sound in habeas." Gov't Br. 1. *But cf. POM Wonderful, LLC v. FTC*, 777 F.3d 478, 499 (D.C. Cir. 2015) (noting that arguments made "in conclusory fashion and without visible support" may be deemed forfeited (quoting *Bd. of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996))). Assuming habeas relief is no longer sought, I turn to plaintiffs' APA claims, which again, I *assume* constitute claims they can assert thereunder.

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[2] *Padilla* reserved judgment on whether the immediate-custodian rule applies to "an alien detained pending deportation." 542 U.S. at 435 n.8.

2. The Political Question Doctrine

a. The Availability of Judicial Review

The government argues that we may not even assess the lawfulness of its conduct. In its view, whether there is an invasion or predatory incursion—or whether an organization qualifies as a foreign nation or government—is a political question unreviewable by the courts.

Federal courts possess a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *accord Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.). One "limited and narrow exception" to this duty arises when a case presents a purely "political question." *Starr Int'l Co., Inc. v. United States*, 910 F.3d 527, 533 (D.C. Cir. 2018) (citing *United States v. Munoz-Flores*, 495 U.S. 385 (1990)). A case falls within the sparing ambit of the political question doctrine "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). It is not enough to highlight that "the issues have political implications," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)), or that the case "lies beyond judicial cognizance" because it "touches foreign relations." *Baker*, 369 U.S. at 211.

At the outset, the government's suggestion that judicial review of the Alien Enemies Act is categorically foreclosed is incorrect. *See* Gov't Br. 14 (allowing that there could be a narrow sliver of questions "potentially" open to review without conceding the point). Nothing in the text of the AEA expressly

or implicitly forecloses the strong "presumption [of] judicial review." *Coll. of Am. Pathologists v. Heckler*, 734 F.2d 859, 862 (D.C. Cir. 1984). That result accords with the understanding of the enacting legislature. In the Fifth Congress, supporters of the AEA insisted "persons [] imprisoned [under the Act] would [] have the power of demanding a trial." 8 Annals of Cong. 1958 (1798). And early practice comports with that understanding. *See McGirt v. Oklahoma*, 591 U.S. 894, 914 (2020) (explaining that early practice can shed light on an ambiguous statute). For example, during the War of 1812, the Pennsylvania Supreme Court entertained a habeas petition from a British resident of Philadelphia challenging his relocation under the AEA. *See Lockington's Case*, Bright (N.P.) 269 (Pa. 1813); *Boumediene v. Bush*, 476 F.3d 981, 988–89 (D.C. Cir. 2007) (describing the case), *rev'd*, 553 U.S. 723 (2008). Chief Justice Marshall, riding circuit and sitting with St. George Tucker, ordered the release of an alien detained under the Act. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2D 39, 41–42 (2005) (reproducing Marshall's decision in *United States v. Williams*).

b. The Scope of Judicial Review

Although these cases establish the availability of judicial review, they do not settle the scope of that review. The government asserts that the "sole question" amenable to judicial scrutiny is whether a detained individual is "an alien enemy," Gov't Br. 14, *i.e.*, whether the person is a fourteen year or older "native[], citizen[], denizen[], or subject[]" of a presidentially declared hostile nation. 50 U.S.C. § 21. Any other AEA prerequisites are purportedly "political question[s]" "outside the competence of the courts." Gov't Br. 13.

The Court does not approach this issue in an analytic vacuum. In *Ludecke v. Watkins*, the Supreme Court reviewed the habeas petition of a German alien detained under the AEA during the Second World War. 335 U.S. at 162–63. Following Germany's unconditional surrender and a cessation of actual hostilities, the petitioner claimed that there was no longer a war giving rise to AEA authority. *Id.* at 166. Splitting 5-4, the Court disagreed. As it explained, a mere ceasefire does not conclusively resolve a war, nor do war powers subside simply because the "shooting stops." *Id.* at 167. The mode of ending a war "is a political act" and courts "would be assuming the functions of the political agencies" to declare a war over when "[t]he political branch of the Government" has not. *Id.* at 169–70. The quantum of threat posed by enemy aliens during "a state of war [] when the guns are silent but the peace of Peace has not come" is a "political judgment for which judges have neither technical competence nor official responsibility." *Id.* at 170.

From *Ludecke*, the government draws the mistaken inference that all questions of AEA authority are political and thus beyond the scope of judicial review. But that is not what the Court held. In no uncertain terms, the Court said the AEA "preclude[s] judicial review . . . [*b*]*arring questions of interpretation and constitutionality*." *Id.* at 163 (emphasis added). Questions of interpretation and constitutionality—the heartland of the judicial ken—are subject to judicial review. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (explaining that "a decision which calls for applying no more than the traditional rules of statutory construction" is not a political question). Indeed, the *Ludecke* Court itself engaged in interpretation, rejecting a definition of "the statutory phrase 'declared war'" that would "mean 'state of actual hostilities.'" *Id.* at 166 n.11, 170–71. *Ludecke* did not foreclose courts' ability to interpret the AEA's predicate

acts—a declared war, invasion or predatory incursion—or whether such conditions exist. Instead, *Ludecke* stands for the proposition that when and by what means to end that acknowledged war are choices "constitutional[ly] commit[ted] . . . to a coordinate political department." *Nixon*, 506 U.S. at 228.

Ludecke itself couched its holding in the line between law and policy and the role of the judge to only decide the former. The Alien Enemies Act, the Court explained, sets forth "conditions upon which it might be invoked" but is silent as to "how long the power should last when properly invoked." *Ludecke*, 335 U.S. at 166 n.11. The petitioner did not contest the "propriety" of the conditional trigger—"the President's Proclamation of War"—only its continued durability. *Id.* That latter question (how long the power should last) has no answer in the plain text of the Act. Put another way, such a question is lacking "judicially discoverable and manageable standards" and thus lies outside the judicial purview. *Nixon*, 506 U.S. at 228. But conditional questions—the legal meaning of war, invasion and predatory incursion—are well within courts' bailiwick.[3]

[3] The government also quotes *Ludecke*'s statement that "[t]he very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion." *Id.* at 164. But the Court was simply rejecting the argument that judicial approval was a *prerequisite* to arrest, detention or deportation. That principle had been established as early as the War of 1812. *See Lockington v. Smith*, 115 F. Cas. 758 (C.C.D. Pa. 1817). Indeed, immediately after the *Ludecke* language the government quotes, the Court dropped a footnote containing a long recitation from and citation to *Lockington*. *Ludecke*, 335 U.S. at 164 n.7. And *Lockington* did not foreclose

One month before the Supreme Court's decision in *Ludecke*, this Court reviewed a nearly identical challenge seeking injunctive and declaratory relief against enforcement of the AEA. *See Citizens Protective League*, 155 F.2d at 290. The challengers similarly alleged that AEA authority lapsed with the cessation of hostilities with Germany. *Id.* at 292. We rejected the challengers' war-termination argument because "[i]t is not for the courts to determine the end of a war declared by the Congress." *Id.* at 295. We said no more—and no less—than the Supreme Court would the following month. The elected branches—not the unelected bench—decide when a war has terminated. That is a question of *fact* for elected leaders. That does not mean that courts cannot pass on the *legal* meaning of statutory terms.

Finally, the government cites the Ninth Circuit's decision in *California v. United States* for the proposition that an invasion is a nonjusticiable political question. 104 F.3d 1086 (9th Cir. 1997). That case is inapposite and—insofar as it carries any relevance—cuts directly against the government. There, California advanced precisely the theory the government claims here: that illegal immigration constitutes an invasion of the United States. *Id.* at 1090. This was part of a theory—advanced by several states—asserting that (i) illegal immigration is an invasion; (ii) the United States was derelict in its duties under the Guarantee Clause to repel that invasion; and (iii) therefore the United States should compensate the states and better enforce immigration laws. *Id.* The Ninth Circuit had none of it, deeming the issue a political question better suited to the halls of the Congress than the Article III bench. *Id.* at 1091.

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judicial review; it expressly entertained a habeas challenge and then rejected it on the merits. *Lockington*, 115 F. Cas. at 759–62.

From that holding, the government draws the mistaken proposition that the existence *vel non* of an invasion is beyond judicial reach. That misreads *California*. That court rightly disclaimed any role "to determine that the United States has been 'invaded' *when the political branches have made no such determination*." *Id.* (emphasis added). This is merely the inverse of the *Ludecke* principle: just as the courts will not declare a properly declared war ended until the political branches do so, they will not start a war on the government's behalf. Neither side of the coin precludes judicial review of whether the Executive has properly invoked a wartime authority. And insofar as *California* has any bearing on this case, it is *against* the government. Although the court declared the issue a political question, it also rejected the states' immigration-as-invasion theory on the merits. As the court put it, invasion refers to "situations wherein a state is exposed to armed hostility from another political entity" and "was not intended to be used as urged by California." *Id.* (citing the Federalist No. 43 (J. Madison)).[4]

At bottom, the government errs by "suppos[ing] that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Sensitive subject matter alone does not shroud a law from the judicial eye. *Cf. Japan Whaling Ass'n*, 478 U.S. at 230 ("As *Baker* plainly held, . . . courts have the authority to construe treaties."). Indeed, we have previously considered the precise sort of question that the

[4] Other circuits confronting similar claims have likewise concluded that declaring an invasion by judicial fiat would pervert the proper role of the political branches, and also that illegal immigration is not an "invasion." *See Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) (explaining that "invasion" requires "armed hostility from another political entity," which is not "the influx of legal and illegal aliens into" the United States); *New Jersey v. United States*, 91 F.3d 463, 468–70 (3d Cir. 1996) (same).

government contends we cannot. *See Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 514, (D.C. Cir. 2018) (reviewing whether certain conduct rises to the level of "an act of war within the meaning of [a] statut[e]"); *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1015–16 (2d Cir. 1974) (assessing whether a plane's hijacking was a "warlike act" or "warlike operation"). There is a "strong presumption" in favor of judicial review of agency action like that of the Department of Homeland Security here, which may be overcome only by "clear and convincing evidence" that the Congress intended to strip jurisdiction over the particular category of challenge. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229–30 (2020). The government points us to no such textual hook. And its precedent fails to fill the gap.

3. The Alien Enemies Act

The AEA provides that "[w]henever there is a declared war . . . or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government," its apprehension, detention and removal powers apply. 50 U.S.C. § 21. Quoting a dictionary over two-hundred years post-enactment, the government claims that the term "invasion" as used in the AEA encompasses "the arrival somewhere of people or things who are not wanted there." Gov't Br. 17 (alteration omitted) (quoting *Invasion*, *Black's Law Dictionary* (12th ed. 2024)). The text and its original meaning say otherwise.

a. Invasion

Begin with the text. The term "invasion" was a legal term of art with a well-defined meaning at the Founding. It required far more than an unwanted entry; to constitute an invasion, there had to be hostilities. As one leading dictionary of the era specifies, an invasion is a "[h]ostile entrance upon the right or

possessions of another; hostile encroachment," such as when "William the Conqueror invaded England." Samuel Johnson, *Invasion*, sense 1, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773). As another recounts, an invasion is a "hostile entrance into the possession of another; particularly the entrance of a hostile army into a country for the purpose of conquest or plunder, or the attack of a military force." Noah Webster, *Invasion*, sense 1, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). And because the invasion must be "by any foreign nation or government," 50 U.S.C § 21, that entity would be an invader—*i.e.*, "[o]ne who enters the territory of another with a view to war, conquest or plunder." Webster, *Invader*, sense 1.

Next, look to context. The term "invasion" appears as part of a list of three interrelated terms: (i) "a declared war" or "any" (ii) "invasion" or (iii) "predatory incursion." The basic interpretive principle of *noscitur a sociis* counsels reading an ambiguous word that appears in a list of related terms in light of the company it keeps. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). There could be a congressionally declared war, an invasion by the belligerent government or a lesser incursion into the United States. Each could trigger a formal change in relations between the United States and the hostile power under the law of nations, and, in turn, the relationship of America to that nation's people. The surrounding statutory context confirms as much.

First, the invasion must be "against the *territory* of the United States by any foreign nation or government." 50 U.S.C. § 21 (emphasis added). The requirement that the "invasion" be conducted by a nation-state and against the United States' "territory" supports that the Congress was using "invasion" in

a military sense of the term.[5] *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 131 (1807) (describing levying war against the United States as "a military enterprize . . . against any of the territories of the United States"); *Wiborg v. United States*, 163 U.S. 632, 633 (1896) (explaining that a group of seamen were charged with preparing for a "military expedition . . . against the territory and dominions of a foreign prince"). Undesired people do not arrive *against* the territory. But foreign armies can—and as the 1798 Congress feared might—invade the territory of the United States.[6] Second, the invasion may be actual, "attempted, or threatened." 5 U.S.C. § 21. Again, when used in reference to hostilities among nations, an attempted or threatened invasion of the United States would mark a logical trigger for enhanced presidential authority. Third, and relatedly, the conditional list of triggering events—a declared war, invasion or predatory incursion—must be read against the means the Congress employed to combat the same. The AEA authorizes the President to restrain and remove the nationals of a belligerent foreign power. Such power tracks when invasion is considered in its military sense.

Finally, consider history. The Alien Enemies Act was enacted by the Fifth Congress amid an actual conflict—the Quasi-War—with France, a foreign power. War was front and

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[5] Invasion had a secondary meaning at the Founding that described "[a]n attack on the rights of another; infringement or violation" of "the rights of another." Webster, *Invasion*, sense 2; *see* THE DECLARATION OF INDEPENDENCE para. 7 (U.S. 1776) (accusing the Crown of an "invasion on the rights of the people"); *id.* para. 8 (returning to a military connotation of invasion). By focusing on territory rather than individuals or rights, the Congress made plain it was using the military sense of the term.

[6] Although TdA and other drug cartels are reported to control portions of other countries, that is not the case in the United States.

center in the minds of the enacting legislature. A little over one month before enacting the AEA, the same Congress authorized the President to raise a standing army of 10,000 men to combat any French invasion. But he could do so only "in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion." Act of May 28, 1798, ch. 47, § 1, 1 Stat. 558. This language bears more than a passing resemblance to the language of the AEA, which the Congress enacted a mere thirty-nine days later. In his most famous exposition against the Alien and Sedition Act, Madison explained that an "[i]nvasion is an operation of war." James Madison, Report of 1800 (Jan. 7, 1800), *in* Founders Online [https://perma.cc/2D3N-N64Z]. In such times, the "law of nations" allowed for the expulsion of alien enemies as "an exercise of the power of war." *Id.*

Debates in the Congress surrounding ratification of the Alien and Sedition Acts support this read. Rep. Joshua Coit of Connecticut warned that the United States "may very shortly be involved in war" against France and that the "immense number of French citizens in our country" could threaten the Republic. GORDON S. WOOD, EMPIRE OF LIBERTY 247 (2009). Rep. James Bayard of Delaware pushed back on critics of the new laws by warning of aliens who might be "likely to join the standard of an enemy, in case of an invasion." 8 Annals of Cong. 1966 (1798). Rep. John Allen of Connecticut cautioned that the country could not "wait for an invasion, or threatened invasion" before granting the power to the President to remove aliens, noting that multiple European powers had fallen to France "by means of [alien] agents of the French nation." *Id.* at 1578. Opponents of the Acts contested their constitutionality and warned that—if accepted—they could lead to the suspension of habeas corpus, which is allowable "in cases of rebellion or *invasion*." *Id.* at 1956 (Statement of Rep. Albert

Gallatin of Pennsylvania) (citing U.S. Const. art. I., § 9, cl. 2) (emphasis added). Supporters disputed that any suspension would occur, *id.* at 1958, but did not dispute that the AEA drew on wartime powers. On the contrary, they invoked, among other authority, the Congress's "power . . . of providing for the common defence," *id.* at 1959 (statement of Rep. Gray Otis of Massachusetts) and the President's "powers which [he] already possesses, as Commander-in-Chief." *Id.* at 1791.[7]

This should come as no surprise. The term "invasion" was well known to the Fifth Congress and the American public circa 1798. The phrase echoes throughout the Constitution ratified by the people just nine years before. And *in every instance*, it is used in a military sense. For example, the Guarantee Clause provides that "[t]he United States shall . . . protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, § 4. The clause is a federal guarantee to the states against attack from without (invasion) or within (insurrection). In describing the clause, the Federalist Papers refer to invasion and domestic violence as "bloody" affairs involving "military talents and experience" and "an appeal to the sword." The Federalist No. 44 (J. Madison). To effectuate the guarantee, the Congress has power "[t]o provide for calling forth the Militia to . . . suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. Again, to use military force against invasion. During these exigent times of hostilities—"in Cases of Rebellion or Invasion"—the Congress may suspend "The

[7] Although "legislative history is not the law," *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019), it can provide some probative evidence of the original public meaning of the text. And here, congressional debates squarely accord with the plain meaning of the text in context and are thus "extra icing on a cake already frosted." *Van Buren v. United States*, 593 U.S. 374, 394 (2021).

Privilege of the Writ of Habeas Corpus . . . when . . . the public Safety may require it." *Id.* art. I, § 9, cl. 2. Finally, if the federal guarantee fails, a state may exercise its Article I power to "engage in War" but only if "actually invaded, or in such imminent Danger as will not admit of delay." *Id.* art. I, § 10, cl. 3. When the Constitution repeats a phrase across multiple clauses—and the early Congresses echo that phrase in statute—it is a strong signal that the text should be read *in pari materia*. *See* 2B Shambie Singer & Norman J. Singer, *Sutherland Statutes & Statutory Construction* (7th ed. Nov. 2024 update) § 51:1–3; Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 788–91 (1999). The theme that rings true is that an invasion is a military affair, not one of migration.

What evidence does the government muster against the weight of this evidence? It marshals a lone contemporary dictionary and then plucks the third-order usage of the term after skipping over its (still) more common military meaning. *See* Gov't Br. 17 (citing *Invasion*, sense 3, *Black's Law Dictionary* (12th ed. 2024)). *But see id.*, sense 1 ("[a] military force's hostile entry into a country or territory"); *cf. District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) ("Normal meaning . . . excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.").

b. Predatory Incursion

The government finds no safer refuge in the alternative "predatory incursion." The government defines the term as "(1) an entry into the United States, (2) for purposes contrary to the interests or laws of the United States." Gov't Br. 18. And it explains that illegal immigration and drug trafficking readily qualify under that standard. As before, the government misreads the text, context and history. An incursion is a lesser

form of invasion; an "[a]ttack" or "[i]nvasion without conquest." Samuel Johnson, *Incursion*, senses 1 & 2, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773). Its predatory nature includes a "[p]lundering," such as the "*predatory* war made by Scotland." *Id.*, *Predatory*, sense 1. Secretary of State Thomas Pickering used the term to describe a lesser form of attack that France could conduct against the U.S. and which, in his view, could be repelled by the militia. *See* Letter from Thomas Pickering to Alexander Hamilton (June 9, 1798), *in* Founders Online [https://perma.cc/VD5M-QSNA]. This was raised in contradistinction to a full invasion, which would require an army. *Id.* Rep. Otis likewise described a predatory incursion as a lesser form of invasion or war. 8 Annals of Cong. 1791 (1798). Early American caselaw sounds a similar theme: incursions referred to violent conflict. Alexander Dallas, appearing before the Marshall Court, described "predatory incursions of the Indians" onto Pennsylvania's frontier, which had led to "an Indian war." *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1, 11 (1805).[8] Chief Justice Marshall referred to "incursions of hostile Indians," which involved "constant scenes of killings and scalping," and led to a retaliatory "war of extermination." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831); *accord Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 545 (1832) (explaining that Pennsylvania's royal charter included "the power of war" to repel "incursions" by "barbarous nations"). Like its statutory counterparts, predatory incursion referred to a form of hostilities against the United States by another nation-

[8] Alexander Dallas was a lawyer and the first reporter of Supreme Court decisions responsible for the "Dallas" series. He later served as Secretary of the Commonwealth of Pennsylvania, U.S. attorney for the Eastern District of Pennsylvania and Secretary of the Treasury.

state, a form of attack short of war. Migration alone did not suffice.

4. Issues Not Decided

Preliminary relief is not simply a fast track to the merits. Because the Supreme Court has instructed that likelihood of success on the merits is among "the most critical" factors, the parties' underlying dispute must be addressed. *Nken*, 556 U.S. at 434. Had the government shown a likelihood of success on any of the three issues above, it would have prevailed on the first factor. Two of the three issues discussed go to jurisdiction and all present purely legal questions amenable to a provisional peek at the merits. The multitude of outstanding issues raised by the parties are more amenable to resolution by the district court on remand than this Court on expedited review. It bears emphasis what we are *not* deciding.

First, the analysis *supra* III.A.1–3 represents a preliminary view of the merits. The government remains free to muster additional evidence and arguments. But on the record presented, the government has yet to show a strong likelihood of prevailing. That is not "in any sense intended as a final decision" or meant to "intimate [a] view as to the ultimate merits." *Brown v. Chote*, 411 U.S. 452, 456–57 (1973) (describing the role of preliminary rulings); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1982) (emphasizing that it would be error to "improperly equate[] 'likelihood of success' with 'success.'"). Just as plaintiffs' TRO does not signal that they are "absolutely certain" to prevail, *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), neither the district court nor the parties should attempt to imbue this opinion with an aura of finality.

Second, I do not pass on whether TdA has conducted an "invasion or predatory incursion" "against the territory of the

United States." 50 U.S.C. § 21. The government will have ample opportunity to prove its case and its evidence should be afforded the requisite deference due the President's national security judgments. *See*, *e.g.*, *Holder v. Humanitarian L. Project*, 561 U.S. 1, 36 (2010) (recognizing that the government's judgment in "sensitive [areas of] national security and foreign affairs" "is entitled to significant weight"); *Trump v. Hawaii*, 585 U.S. 667, 704 (2018) (noting the "constrained" nature of judicial "inquiry into matters of . . . national security").

Third, I offer no view on whether TdA's conduct is "perpetrated, attempted, or threatened . . . *by a[] foreign nation or government*." 50 U.S.C. § 21 (emphasis added). The Proclamation claims that TdA "is closely aligned with, and [] has infiltrated" the Venezuelan state such that it is a "hybrid criminal state." This issue raises disputed questions of sovereignty, authority and control that turn as much on contested facts as they do legal conclusions. Ours is a court of review, not first view; such issues are appropriately left to the district court in the first instance.

Finally, plaintiffs contend that the Immigration and Nationality Act (INA)'s procedures are the "exclusive procedure" for removal and thus eclipse any contrary authority in the AEA. Pl. Br. 24 (quoting 8 U.S.C. § 1229a(a)(3)). This claim, however, speaks more to plaintiffs' likelihood of success on the merits than the government's. And although it is a primarily legal question, it is one we need not—and therefore ought not—decide in this nascent posture.

B. Balance of Harms & Public Interest

The harm to the government and the public interest factor "merge" when the government is seeking a stay, so they are considered together. *Nken*, 556 U.S. at 435. The government

spends almost all of its brief arguing the merits. As explained, the central purpose of preliminary relief—whether at the trial level or the appellate level—is to prevent irreparable injury, not to short-circuit the normal course of litigation. The equities thus loom large in this early posture. Yet the only mention of irreparable injury in the government's brief is to deny that plaintiffs' injury is irreparable. *See* Gov't Br. 12–13. Although plaintiffs must show irreparable injury to secure an injunction, it is now the defendant who—seeking relief from an injunction so obtained—must show irreparable injury absent a stay of the injunction. *See Nken*, 556 U.S. at 434 (requiring a stay applicant to show "irreparabl[e] injur[y] absent a stay"). Insofar as the argument is preserved, it is unavailing.

The government warns that "delayed removal *may be* removal denied." Gov't Br. 12 (emphasis added). Equity will not act "against something merely feared as liable to occur at some indefinite time." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931); *see also Murthy v. Missouri*, 144 S. Ct. 7, 9 (2023) (Alito, J., with Thomas and Gorsuch, JJ., dissenting from grant of application for stay) ("[S]peculation does not establish irreparable harm."); *Singh v. Berger*, 56 F.4th 88, 97 (D.C. Cir. 2022) (explaining that "the [government] must demonstrate the specific harm that 'would'—not could—result from" denying a stay).

Next, the government claims that the TROs "impede the President from using his constitutional and statutory authority to address a predatory invasion by a hostile group." Gov't Reply 13. The President's inherent constitutional authority is not the subject of the TRO and the burden on his statutory powers under the AEA is limited. The district court's injunction covers only deportation. The President may arrest and detain purported enemy aliens under the Proclamation without violating that order. Insofar as exigent circumstances

require prompt deportation, the President can tap his substantial authorities under the INA to do so. Finally, the TRO expires in just a few days. The government has not explained why its purported harms rise or fall on a few days' delay.

The Executive's burdens are comparatively modest compared to the plaintiffs'. Lifting the injunctions risks exiling plaintiffs to a land that is not their country of origin. *See J.G.G. v. Trump*, 1:25-cv-766 (D.D.C. Mar. 16, 2025), ECF Nos. 19, 21 (informing the district court that Venezuelan members of the plaintiff class were deported to El Salvador). Indeed, at oral argument before this Court, the government in no uncertain terms conveyed that—were the injunction lifted—it would immediately begin deporting plaintiffs without notice. Plaintiffs allege that the government has renditioned innocent foreign nationals in its pursuit against TdA. For example, one plaintiff alleges that he suffered brutal torture with "electric shocks and suffocation" for demonstrating against the Venezuelan regime. *Id.* (D.D.C. Mar. 19, 2025), ECF No. 44-5 ¶ 2. While awaiting adjudication of his asylum claim, he was expelled to "El Salvador with no notice to counsel or family" based on a misinterpretation of a soccer tattoo. *Id.* ¶¶ 5–7. To date, his family and counsel have "lost all contact" and "have no information regarding his whereabouts or condition." *Id.* ¶ 10. The government concedes it "lack[s] a complete profile" or even "specific information about each individual" it has targeted for summary removal. *Id.* (D.D.C. Mar. 17, 2025), ECF No. 26-1 ¶ 9.

There is a "public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436. The government's response to this interest is that "removal . . . is not categorically irreparable." Gov't Br. 12 (quoting *Nken*, 556

U.S. at 435). But in this procedural posture, it is not plaintiffs' burden to prove irreparable injury; it is the government's. We must consider whether a stay will "substantially injure" plaintiffs. *Nken*, 556 U.S. at 434. And *Nken* emphatically states that "removal is a serious burden for many aliens." *Id.* at 435.

For these reasons, the government has not met its burden to obtain the "extraordinary remedy" of staying the district court's injunctions. *KalshiEX LLC v. CFTC*, 119 F.4th 58, 63 (D.C. Cir. 2024) (cleaned up).

C. The Scope of Relief

Even if we decline to stay the district court's injunctions, the government contends that we should narrow their scope. In its view, the lower court entered an "unconstitutional" "universal TRO." Gov't Br. 20; Gov't Reply 15–16. Universal injunctions "ha[ve] significantly stretched the traditional equitable powers of Article III courts." *Indus. Energy Consumers of Am. v. FERC*, 125 F.4th 1156, 1168 (D.C. Cir. 2025) (Henderson, J., concurring). Even if universal relief is constitutionally sound—and there are reasons to believe it is not—courts should be particularly wary before entering "an injunction that bar[s] the Government from enforcing the President's Proclamation against anyone" given the "toll on the federal system . . . and for the Executive Branch." *Hawaii*, 585 U.S. at 713 (Thomas, J., concurring). But what the district court did here was *not* a universal injunction—*i.e.*, it did not enter relief that goes beyond the parties to the suit. Instead, the court followed the Rules of Civil Procedure and certified a class—a class that will be bound by an unfavorable judgment just as much as by a favorable one. *See Indus. Energy Consumers of Am.*, 125 F.4th at 1169 (Henderson, J., concurring) (pointing to class actions as a procedurally proper

way to afford relief to a disparate class); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 418, 475 (2017) (describing class actions as the "obvious answer" to the problems universal injunctions seek to address).[9]

Although the injunctions' breadth is permissible as to the plaintiffs, it is not as to all defendants. Specifically, the district court's TROs enjoin the President of the United States himself. At common law, the Chancellor could not grant "any relief against the king, or direct any act to be done by him." 3 William Blackstone, Commentaries on the Laws of England 428. This historic limitation carries forward to today and strips the federal courts of equitable "jurisdiction . . . to enjoin the President in the performance of his official duties." *Johnson*, 71 U.S. at 501. Separation of powers concerns pose an independent bar. We can no more "direct the President to take a specific executive act" than we can compel the "Congress to perform particular legislative duties." *Franklin*, 505 U.S. at 829 (Scalia, J., concurring in part and concurring in the judgment). However, the government has not sought to lift the injunction as to the President alone. We do not ordinarily dispense "relief that a party failed to clearly articulate in its briefs." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014). I decline to do *so sua* sponte today. On remand, the district court should modify its TROs to exclude the President from their scope.

* * *

At this early stage, the government has yet to show a likelihood of success on the merits. The equities favor the plaintiffs. And the district court entered the TROs for a quintessentially valid purpose: to protect its remedial authority

[9] I do not pass on the class action "fit" of the plaintiffs' claims.

long enough to consider the parties' arguments. Accordingly, and for the foregoing reasons, the request to stay the district court's TROs should be denied.

MILLETT, *Circuit Judge*, concurring: "The government of the United States has been emphatically termed a government of laws, and not of men" and women. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). This means that the United States government adheres faithfully to the Constitution's requirements and duly enacted laws. Any government can hew to a legal path when dealing with easy and workaday matters of governance. The true mark of this great Nation under law is that we adhere to legal requirements even when it is hard, even when important national interests are at stake, and even when the claimant may be unpopular. For if the government can choose to abandon fair and equal process for some people, it can do the same for everyone.

In this appeal, the government seeks exceptional emergency relief from temporary restraining orders that do just one thing—prevent the summary removal of Venezuelan immigrants to a notorious prison in El Salvador or other unknown locations without first affording them some semblance of due process to contest the legal and factual bases for removal. Plaintiffs are Venezuelan immigrants who the government claims are members of a violent criminal gang known as Tren de Aragua. In the government's view, based on its allegation alone, Plaintiffs can be removed immediately with no notice, no hearing, no opportunity—zero process—to show that they are not members of the gang, to contest their eligibility for removal under the law, or to invoke legal protections against being sent to a place where it appears likely they will be tortured and their lives endangered.

The district court has been handling this matter with great expedition and circumspection, and its orders do nothing more than freeze the status quo until weighty and unprecedented legal issues can be addressed through a soon-forthcoming preliminary injunction proceeding. There is neither jurisdiction nor reason for this court to interfere at this very preliminary stage or to allow the government to singlehandedly

moot the Plaintiffs' claims by immediately removing them beyond the reach of their lawyers or the court. *See* Oral Arg. 1:44:39-1:46:23, *J.G.G. v. Trump*, 25-5067 (D.C. Cir. 2025), https://perma.cc/LB7B-7UFN (J. Millett: "My question is, if we were to grant the relief you request, would the government consider it necessary to allow time to file a habeas petition before removing people? * * * [Is it] the government's position that it could immediately resume mass removals of the five named Plaintiffs and the class members, immediately? Government: "Your Honor, * * * we take the position that the AEA does not require notice * * * [and] the government believes there would not be a limitation [on removal.]"). The Constitution's demand of due process cannot be so easily thrown aside.

For those reasons I agree with the judgment denying the government's motions for stays in this case.

I

This case arises at the intersection of the Due Process Clause of the Constitution, U.S. CONST. Amend. V, and the Alien Enemies Act of 1798, 50 U.S.C. §§ 21-24.

A

The Fifth Amendment to the Constitution provides, as relevant here, that "[n]o person shall * * * be deprived of life, liberty, or property without due process of law." U.S. CONST. Amend. V. The "persons[s]" protected by that foundational guarantee include all persons present in the United States, the law-abiding as well as those who violate the law, the immigrant without documentation as well as the citizen. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in

deportation proceedings.") (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903)).

While the Due Process Clause's coverage is broad, the amount of process due can vary based on the nature and context of the governmental intrusion. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due. * * * Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.") (internal citation and quotation marks omitted); *Snyder v. Massachusetts*, 291 U.S. 97, 116-117 (1934) ("Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. * * * What is fair in one set of circumstances may be an act of tyranny in others.").

At its most basic, due process requires notice of adverse governmental action, an opportunity to be heard, and the right to an unbiased decisionmaker. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) (Due process is violated when the decision maker has a "direct" and "substantial" interest "in reaching a conclusion against" the defendant.).

In the specific context of immigration, Congress has enacted a comprehensive legal regime providing due process to those who the government alleges are unlawfully present in the United States. The Immigration and Nationality Act provides "the sole and exclusive procedure for determining whether an alien may be * * * removed from the United States." 8 U.S.C. § 1229a(a)(3). Under that Act, noncitizens are entitled to "apply for asylum" if they can "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for [their] persecution" in the country of their nationality. *Id.* § 1158(a)(1), (b)(1)(B)(i). They also can seek "withholding of removal" to a country where it is more likely than not that they would face persecution. *See id.* § 1231(b)(3). In addition, the United States is a signatory to the Convention Against Torture and so is obligated not to return individuals to a country where they more likely than not would be tortured. *See id*. § 1231 note.

To protect the Nation's safety and security, Congress enacted special expedited removal proceedings for noncitizens who have been convicted of committing aggravated felonies, 8 U.S.C. § 1228(a), or are deemed to be "alien terrorist[s,]*" id.* § 1533(c)(2)(B). Even those expedited proceedings allow for notice and an opportunity to be heard before a neutral decisionmaker. *Id.* § 1229 ("In removal proceedings * * * written notice * * *shall be given in person to the alien * * * specifying * * * [t]he time and place at which the proceedings will be held*."); id.* § 1534(b)-(c) ("An alien who is the subject of a removal hearing under this subchapter shall be given reasonable notice of the nature of the charges * * * and the time and place at which the hearing will be held[.] * * * The alien shall have a right to be present at such hearing[.]").

B

The Alien Enemies Act ("AEA") allows the President to "apprehend[], restrain[], secure[], and remove[]" "alien enemies" whenever "there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion" into the United States. 50 U.S.C. § 21. Alien enemies are "natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward" who are "not actually naturalized[.]" *Id.*

If there has been no formal declaration of war by Congress, the President must make a "public proclamation[,]" 50 U.S.C. § 21, and "allow[]" enemy aliens a "reasonable time" to comply with the proclamation's orders, *id.* § 22. The only exception is for enemy aliens "chargeable with actual hostility, or other crime against the public safety[.]" *Id.*

Under the AEA, when a "complaint against" an "alien enemy resident" is presented to a court of the United States, the court's "duty" is to provide "a full examination and hearing on such complaint" and to decide whether there is "sufficient cause" to have that person removed or otherwise detained. 50 U.S.C. § 23.

The AEA was one of several measures known as the Alien and Sedition Acts passed in 1798 when the United States feared that France was planning a military invasion. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 588-591 (1993). The original version of the law was introduced by pro-war

Federalists and it would have required federal courts to simply fall in line and enforce the President's order:

> [A]ll Justices and Judges of the Courts of the United States * * * shall be * * * required to discharge, enforce, and execute the duties and authorities which shall be incumbent upon them respectively, by virtue of the rules and directions which, in any proclamation or other public act, the President of the United States shall and may make[.]

8 ANNALS OF CONG. 1786 (1798).

That language received prompt opposition from Republicans who strongly resisted its effort to make judges "be obedient to the will of the President" rather than "being obedient to the laws." 8 ANNALS OF CONG. 1789 (1798) (statement of Rep. Gallatin). As Representative Gallatin summarized the problem, "the whole of the bill might as well be in two or three words, viz: 'The President of the United States shall have the power to remove, restrict, or confine alien enemies and citizens whom he may consider as suspected persons.'" *Id.*

That original version of the Act was quickly rejected. Congress enacted instead the provision now codified at 50 U.S.C. § 23, in which courts, when presented with a case, are to undertake an independent examination of the asserted authority to remove a person under the Act. *An Act Respecting Alien Enemies*, ch. 66, § 3, 1 Stat. 578 (1798). As Representative Gordon explained, the AEA as amended would not violate "habeas corpus" because "[t]here is nothing in this bill to prevent a person from being brought before a Judge." 8 ANNALS OF CONG. 1985 (1798); *see id.* at 2026 (statement of Rep. Harper) ("Every man seized under this law, will have a

right to sue out a writ of habeas corpus, and if it appear that he is a citizen, he must be discharged."); *id.* at 1967 (statement of Rep. Bayard) ("This bill provides only for the arrestation of persons in certain cases, and it will be competent for every person so arrested to obtain a writ of habeas corpus.").[1]

As James Madison explained, the AEA was passed based on Congress's "power to declare war" and was in accord with "the law of nations." *The Report of 1800*. The Supreme Court subsequently agreed with Madison's assessment, holding that the AEA is a constitutional exercise of congressional authority to "vest[] the President" with a "war power" to manage alien enemies during the "shooting war" and an appropriate period thereafter. *Ludecke v. Watkins*, 335 U.S. 160, 165 (1948).

Before now, the AEA has been invoked only three times during the nation's history: the War of 1812, World War I, and World War II. *See Lockington v. Smith*, 15 F. Cas. 758, 758-759 (C.C.D. Pa. 1817) (discussing the War of 1812

[1] The AEA's counterpart was the Alien Friends Act, which gave the President authority to remove "all such aliens as he shall judge dangerous to the peace and safety" regardless of whether there was a declared war or invasion. *An Act Concerning Aliens*, ch. 58, § 1, 1 Stat. 571 (1798). Many considered the Alien Friends Act unconstitutional because it gave the President unreviewable discretion to remove noncitizens. *See* GORDON WOOD, EMPIRE OF LIBERTY 249-250 (2009). James Madison argued that the Alien Friends Act was unlawful because it did not allow for "the benefits of a fair trial[.]" James Madison, *The Report of 1800* (Jan. 7, 1800), https://perma.cc/K564-KQND. Thomas Jefferson also concluded that the Alien Friends Act was contrary to law because it violated the right to "due process[.]" Kentucky General Assembly, *Resolutions Adopted by the Kentucky General Assembly* (Nov. 10, 1798), https://perma.cc/7JL4-N86T. No one was ever removed under the Alien Friends Act and it expired in 1800. AGE OF FEDERALISM, at 591-592.

proclamation); Proclamation, 40 Stat. 1651 (1917) (World War I); Proclamation: Alien Enemies—Japanese, 6 Fed. Reg. 6,321 (Dec. 10, 1941) (World War II).[2]

Judicial review has always been available to noncitizens detained or removed under the AEA. During the War of 1812, Chief Justice John Marshall and federal District Judge St. George Tucker ordered a British subject released because the local marshal had acted beyond his delegated authority by detaining the plaintiff without proper notice. *See* Gerald Neuman & Charles Hobson, *John Marshall and the Enemy Alien*, 9 GREEN BAG 39, 41-43 (2005) (describing the unreported case of *United States v. Thomas Williams* (C.C.D. Va. 1813)). The Pennsylvania Supreme Court later agreed with the Chief Justice that those subject to the AEA are entitled to judicial review. *Lockington's Case*, Bright (N.P.) 269, 273, 285 (Pa. 1813).

These early cases set a precedent followed during the twentieth century. Review was available during World War I, *see, e.g.*, *Ex parte Gilroy*, 257 F. 110, 114 (S.D.N.Y. 1919), as well as World War II, *e.g.*, *Ludecke v. Watkins*, 335 U.S. 160, 172 (1948) ("[H]earings are utilized by the Executive to secure an informed basis for the exercise of summary power[.]"). Indeed, during World War II, a former "member of the Nazi Party" not only received a hearing on his eligibility for removal, but also had his case heard by the Supreme Court. *Ludecke,* 335 U.S. at 162 n.3.

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[2] The AEA has been amended once when, during World War I, language clarified that it applied to both men and women. *An Act to amend section four thousand and sixty-seven of the Revised Statutes by extending its scope to include women*, ch. 55, 40 Stat. 531 (1918).

As the court in *Gilroy* explained, "[v]ital as is the necessity in time of war not to hamper acts of the executive in the defense of the nation and in the prosecution of the war, of equal and perhaps greater importance, is the preservation of constitutional rights." 257 F. 110 at 114.

II

A

Tren de Aragua ("TdA") is a violent transnational criminal organization based in Venezuela. *See* United States Department of State, Designation of International Cartels, (Feb. 20, 2025), https://perma.cc/XJ7F-GY8U. The State Department designated TdA a foreign terrorist organization on February 20, 2025. *See id.*

Although not publicly disclosed at the time, on March 14, 2025, President Trump signed a Proclamation invoking the Alien Enemies Act in response to "the Invasion of the United States by Tren De Aragua." *See* Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren De Aragua, 90 Fed. Reg. 13033 (Mar. 14, 2025). The Proclamation was not released publicly until March 15, 2025, at 3:53 pm ET. *See id*; ECF No. 28-1 (Cerna Decl.) ¶ 5.[3]

The Proclamation "find[s] and declare[s] that TdA is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States[,]" and that "TdA is undertaking hostile actions and conducting irregular warfare against the territory of the United States both directly and at the direction, clandestine or otherwise, of the

[3] All ECF documents refer to the district court docket in this case, *J.G.G. v. Trump*, No. 25-cv-766 (D.D.C. Mar. 18, 2025).

Maduro regime in Venezuela." Proclamation § 1. Based on these findings, the Proclamation provides that "all Venezuelan citizens 14 years of age or older who are members of TdA, are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies." Proclamation § 1. The Proclamation further "direct[s] that all Alien Enemies described in * * * th[e] proclamation are subject to immediate apprehension, detention, and removal, and further that they shall not be permitted residence in the United States." Proclamation § 3. The Proclamation directs the Attorney General and the Secretary of Homeland Security to execute these directives. Proclamation § 4.

The Proclamation does not establish any process by which individuals are given notice of the government's determination that they meet the Proclamation's criteria and are therefore removable to a country of the government's choosing. Nor does the Proclamation establish any process by which individuals may challenge the government's determination that they meet the Proclamation's criteria. Instead, upon the government's determination that an individual meets the Proclamation's criteria, that individual is subject to "immediate" removal, without notice and without time or opportunity to challenge their removal. Proclamation § 3.

B

Plaintiffs are a class of Venezuelan nationals in government custody who the government claims are subject to removal under the Proclamation. Plaintiffs are in the United States without permission or lawful documentation and, as a result, most if not all are already in immigration detention centers across the United States pending immigration hearings

or removal proceedings. But beginning in March 2025, at least some of them were moved to the El Valle Detention Facility in Texas. *See* ECF No. 3-3 (J.G.G. Decl.) ¶ 5; ECF No. 3-4 (Carney Decl. for G.F.F.) ¶ 12; ECF No. 3-5 (Shealy Decl. for J.G.O.) ¶ 5; ECF No. 3-6 (W.G.H. Decl.) ¶ 7; ECF No. 3-8 (J.A.V. Decl.) ¶ 7; ECF No. 44-6 (Thierry Decl.) ¶ 5; ECF No. 44-8 (Kim Decl.) ¶ 5. The government was unable to inform this court whether all individuals subject to the Proclamation have been moved to the El Valle Detention Facility, or whether they are scattered across detention centers around the country. Oral Arg. 1:47:43.

Apparently having caught wind of the forthcoming Proclamation and the summary removals planned under it, in the early morning hours of March 15, 2025, five named Plaintiffs filed in the United States District Court for the District of Columbia a class action complaint and petition for writ of habeas corpus, and a motion for a Temporary Restraining Order ("TRO") against the President, Attorney General, Department of Homeland Security, Immigration and Customs Enforcement, and Department of State. *See* ECF No. 1 (Complaint); ECF No. 3 (TRO Motion). Plaintiffs allege that their expected summary removal would be unlawful because the Proclamation violated the terms of the AEA, bypassed the procedures set forth for removal in the Immigration and Nationality Act, violated the Administrative Procedure Act ("APA"), and deprived the Plaintiffs of constitutionally required due process to challenge their eligibility for removal. *See* ECF No. 1 (Complaint).

All five of the named Plaintiffs vehemently deny that they are members of TdA. *See* ECF No. 3-3 (J.G.G. Decl.) ¶ 3; ECF No. 44-11 (Carney Decl. for G.F.F.) ¶ 3; ECF No. 44-12 (Smyth Decl. for J.A.V.) ¶¶ 9, 11; ECF No. 3-6 (W.G.H. Decl.) ¶ 12; ECF No. 44-9 (Shealy Decl. for J.G.O.) ¶ 4. Several of

the named Plaintiffs state, in fact, that they sought asylum in part because they themselves were victims targeted by TdA and other gangs. *See* ECF No. 44-11 (Carney Decl. for G.F.F.) ¶ 3; ECF No. 44-12 (Smyth Decl. for J.A.V.) ¶ 5; ECF No. 3-6 (W.G.H. Decl.) ¶¶ 3, 11, 12.

According to Plaintiffs' declarations, the government has accused one named Plaintiff, who is a tattoo artist, of TdA membership on the basis of his tattoo design, which was sourced from Google. ECF No. 3-3 (J.G.G. Decl.) ¶ 4. Other individuals subject to the Proclamation have also denied membership in TdA and have stated that the government has wrongly accused them of TdA membership based on tattoos that have no connection to TdA. *See, e.g.*, ECF No. 44-5 (Tobin Decl.) ¶ 7 (declaring that individual is a Venezuelan professional soccer player with a tattoo of a soccer ball with a crown, similar to the logo of his favorite soccer team, Real Madrid). The government also accused another named Plaintiff of TdA membership because he attended a party where he knew no one other than the person who invited him. ECF No. 3-4 (G.F.F. Decl.) ¶¶ 5-6.

At 9:20 am ET, on the morning of March 15, 2025, the district court "contacted the [g]overnment and connected with defense counsel[.]" *J.G.G. v. Trump*, No. 25-cv-766 (JEB), 2025 WL 890401, at *6-7 (D.D.C. Mar. 24, 2025). At 9:40 am ET, the district court granted Plaintiffs' motion for a TRO which prohibited the government from removing the five named Plaintiffs based on the Proclamation for fourteen days absent further order from the district court. Second Minute Order (Mar. 15, 2025). That same day, the government appealed the district court's TRO and filed an emergency motion to stay the TRO in this court. The district court also set an emergency hearing for 5:00 pm ET that day to consider whether to issue a TRO as to the entire class of individuals

whom the government asserts are subject to removal under the Proclamation.

Despite Plaintiffs' lawsuit and the district court's order setting a hearing for that afternoon, the government seems to have begun the removal process that morning. *See* ECF No. 44-9 (Shealy Decl.) ¶ 8; ECF No. 44-10 (Quintero Decl.) ¶ 3; ECF No. (Carney Decl.) ¶¶ 12-13; ECF No. 44-12 (Smyth Decl.) ¶ 14. By 9:20 am ET, at least one named Plaintiff, J.G.O., had been taken to an airport along with other Venezuelans. ECF No. 44-9 (Shealy Decl.) ¶ 8.

On the afternoon of March 15, 2025, the district court held a hearing on Plaintiffs' class certification motion. During the hearing, Plaintiffs represented that two flights "were scheduled for this afternoon that may have already taken off or [will] during this hearing." *See* Mar. 15 Tr. 12:23-25. In response, at 5:22 pm ET, the court adjourned the hearing and directed the government to determine whether removal of individuals under the Proclamation was underway. Around 6:00 pm ET, the district court resumed, and the government represented that it had no flight information to report to the court. *See* Mar. 15 Tr. 15:4-18:8. During the hearing, the district court also allowed Plaintiffs to dismiss their habeas claims without prejudice. *See* Mar. 15 Tr. 22:24-25.

The district court then provisionally certified a class of all Venezuelan noncitizens subject to the Proclamation. *See* Mar. 15 Tr. 23:1-4, 25:9-10. At approximately 6:45 pm ET, the district court issued an oral TRO prohibiting the government from removing members of the class pursuant to the Proclamation for fourteen days absent further order from the district court. *See* Mar. 15 Tr. 41:18-21. The court also directed the government "that any plane containing" individuals subject to the Proclamation "that is going to take

off or is in the air needs to be returned to the United States[.]" Mar. 15 Tr. 43:12-15. The district court emphasized that "this is something that [the government] need[ed] to make sure [was] complied with immediately." Mar. 15 Tr. 43:18-19.

The court issued a written TRO at approximately 7:25 pm ET. *See* Fourth Minute Order (Mar. 15, 2025); ECF No. 21 (Plaintiffs' Response to Defendants' Notice) at 1-2. As relevant here, that order provides: "Plaintiffs' Motion for Class Certification is GRANTED insofar as a class consisting of 'All noncitizens in U.S. custody who are subject to the March 15, 2025, Presidential Proclamation entitled "Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua" and its implementation' is provisionally certified; [] The Government is ENJOINED from removing members of such class (not otherwise subject to removal) pursuant to the Proclamation for 14 days or until further Order of the Court[.]" Fourth Minute Order (Mar. 15, 2025). The court then set a highly expedited schedule for the government to seek vacatur of the TROs. *Id.*

In so ruling, the district court was explicit that its order did not affect the government's ability to apprehend or detain individuals pursuant to the Proclamation, nor did it require the government to release any individual in its custody subject to the Proclamation. Mar. 15 Tr. 42:16-18; Mar. 21 Tr. 9:2-16; *J.G.G.*, 2025 WL 890401, at *1. In addition, neither TRO prevented the government from deporting any individual on the basis of authorities other than the Proclamation, including under the Immigration and Nationality Act. Mar. 15 Tr. 47:5-8; *J.G.G.*, 2025 WL 890401, at *1; *see also* ECF No. 28-1 (Cerna Decl.) ¶ 6 (government informing the court that a plane "departed after" the district court's TRO, "but all individuals on that third plane had Title 8 final removal orders and thus

were not removed solely on the basis of the Proclamation at issue").

C

Questions of the government's compliance with the TROs soon arose, which the district court continues to investigate. *See* Second Minute Order (Mar. 18, 2025); ECF No. 47 (District Court Order dated Mar. 20, 2025); ECF No. 49 (Notice filed by Gov't dated Mar. 20, 2025); ECF No. 50 (Notice filed by Gov't dated Mar. 21, 2025); ECF No. 56 (Notice filed by Gov't dated Mar. 24, 2025).

In those proceedings, the government has taken the position that it was not legally bound by and had no obligation to obey the district court's oral orders directing the return of airplanes in flight. The government's repeated position in district court has been that those oral orders had no legal force until reduced to writing. *See* ECF No. 24 (Gov't Mot. to Vacate) at 2 ("[A]n oral directive is not enforceable as an injunction."); Mar. 17 Tr. 16:12-14 ("Oral statements are not injunctions and [] the written orders always supersede whatever may have been stated in the record[.]"); *id.* at 17:20-21 ("[O]ral statements are not injunctions[.]"); *see also* Mar. 21 Tr. 4:18-19, 6:4-5 (district court noting the government's position that the oral ruling was not binding); Oral Arg. 1:48:24-1:49:19.

On March 24, 2025, the district court denied the government's motion to vacate the TROs. The district court found that Plaintiffs are likely to succeed on their claim that either the Proclamation or its implementation are unlawful under the AEA and unconstitutional for failure to provide Plaintiffs with any advance opportunity to challenge whether they qualify for removal under the Proclamation's terms. *See J.G.G.*, 2025 WL 890401, at *3.

III

The government asks this court to stay the TROs. I agree with Judge Henderson that a stay should be denied. There is an unsurmountable jurisdictional barrier to the government's request for a stay, and the government's own threshold jurisdictional arguments fail. In addition, the balance of harms weighs strongly in favor of the Plaintiffs.

A

1

A stay pending appeal is an "extraordinary" remedy. *Citizens for Resp. & Ethics in Washington v. Federal Election Comm'n*, 904 F.3d 1014, 1017 (D.C. Cir. 2018) (per curiam). To obtain such exceptional relief, the stay applicant must (1) make a "strong showing that [it] is likely to succeed on the merits" of the appeal; (2) demonstrate that it will be "irreparably injured" before the appeal concludes; (3) show that issuing a stay will not "substantially injure the other parties" interested in the proceeding; and (4) establish that "the public interest" favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Here, the standard for obtaining a stay is even more daunting. That is because this court has no jurisdiction to hear an appeal from a temporary restraining order, making any claim of likelihood of success vanishingly low. *See Belbacha v. Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008); *see also Brotherhood of Railway & S. S. Clerks, Freight Handlers, Exp. & Station Emp. v. National Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966) ("A stay pending appeal is always an

extraordinary remedy, and it is no less so when extraordinary jurisdiction must be asserted as a prerequisite.").

By statute, "our appellate jurisdiction generally extends only to the 'final decisions' of district courts." *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261 (D.C. Cir. 2012) (quoting 28 U.S.C. § 1291). There is an exception to that finality requirement for "[i]nterlocutory orders * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). But that provision encompasses "injunctions" only. *See United States v. Hubbard*, 650 F.2d 293, 314 n.73 (D.C. Cir. 1980). There "is no [equivalent] statutory provision for the appeal of a temporary restraining order." *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *4 (D.C. Cir. Feb. 15, 2025) (quoting Wright & Miller, Fed. Prac. & Proc. Civ. § 2951 (3d ed. June 2024 update)).

As a result, we can review a TRO only if the appellant can show that the order is the legal equivalent of a preliminary injunction. *See Belbacha*, 520 F.3d at 455. The "label attached to an order by the trial court is not decisive[,]" and instead appellate courts must "look to other factors" to determine whether a TRO should be treated as a preliminary injunction. *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978) (citation omitted).

Among those factors, we assess whether the TRO (1) remains in force longer than the time permitted for such an order under Federal Rule of Civil Procedure 65, *Sampson v. Murray*, 415 U.S. 61, 86 (1976); (2) "foreclose[s]" the appellant "from pursuing further interlocutory relief in the form of a preliminary injunction," *Belbacha*, 520 F.3d at 455 (citation omitted); or (3) otherwise upsets "the status quo

pending further proceedings" in ways that have "irretrievable" consequences, *Adams*, 570 F.2d at 953.

The government has not shown that any of those exceptions apply.

First, the TROs fall well within the 14-day time length (extendable for another 14 days for "good cause") allowed by Federal Rule of Civil Procedure 65. FED. R. CIV. P. 65(b)(2). The district court has been handling this complicated matter with speed and diligence, and has directed the Plaintiffs to file any motion to convert the TROs into a preliminary injunction by March 26, 2025, which is a date within the original 14-day time period for the TROs. When a district court arranges for a "prompt hearing on a preliminary injunction[,]" this court does not short-circuit that process and treat a TRO as a "*de facto*" injunction. *Office of Pers. Mgmt. v. American Fed'n of Gov't Emps., AFL-CIO*, 473 U.S. 1301, 1305 (1985) (Burger, C.J., in chambers).[4]

Second, the government does not even argue that the TROs have somehow impaired its ability to pursue injunctive relief of its own. So that avenue for appeal of the TROs is closed.

Third, the district court's TROs are carefully tailored just to preserve the status quo while the court obtains briefing and the factual development needed to rule on a motion for a preliminary injunction. In removal cases, the status quo is the "state of affairs before the removal order was entered." *Nken*, 556 U.S. at 418 ("Although such a stay acts to 'ba[r] Executive Branch officials from removing [the applicant] from the

[4] For those reasons, the government's argument that the TROs amount to preliminary injunctions because they are slated to last 14 days is without merit. Gov't First Stay Mot. 3-5.

country,' * * * it does so by returning to the status quo[.]") (citation omitted). That status quo is the time before the Proclamation and removals under it commenced. *See also Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 734 (D.C. Cir. 2022) ("[T]he status quo [i]s 'the last peaceable uncontested status' existing between the parties before the dispute developed.") (quoting 11A Wright & Miller § 2948 (3d ed. 1998)).

Importantly, the district court has tailored its TROs to operate even more narrowly than the status quo by allowing the apprehension and detention of alleged TdA members under the Proclamation, proscribing only their removal under the AEA. Mar. 15 Tr. 42:16-18 (ordering a TRO "to prevent the removal of the class for 14 days"); Mar. 21 Tr. 9:2-16 (underscoring that the TROs allow the government to keep Plaintiffs "in-custody" and do "not order anybody to be released into the United States"); *J.G.G.*, 2025 WL 890401, at *1 ("Neither Order prevented the Government from apprehending anyone pursuant to the * * * Proclamation."). In addition, the court has been explicit that nothing in the TROs prohibits removals based on other legal grounds such as the Immigration and Nationality Act. Mar. 15 Tr. 47:5-8; *J.G.G.*, 2025 WL 890401, at *1 ("[N]either Order prevented the Government from deporting anyone—including Plaintiffs—through authorities *other than* the Proclamation, such as the INA.").

In those ways, this case bears no resemblance to *Adams v. Vance*, *supra*, on which the government hangs its jurisdictional hat. Gov't First Stay Mot. 5; Gov't Second Stay Mot. 9. In *Adams,* this court treated a TRO as a preliminary injunction because, instead of "preserv[ing] the status quo pending further proceedings," it "commanded an unprecedented action irreversibly altering [a] delicate diplomatic balance" in the "arena" of international restrictions on whale hunting. 570

F.2d at 953. In particular, that TRO would have forced the Secretary of State to file a formal "objection" to an action of the International Whaling Commission. *Id.*

The TROs at issue here are the polar opposite. Rather than compelling Executive action, they simply stay the government's hand in part.

2

The government nonetheless argues that the TROs should be treated as injunctions because they work "an extraordinary harm" to the President's authority under Article II to conduct foreign affairs. Gov't First Stay Mot. 4; Gov't Second Stay Mot. 8. But the government has shown no such harm here, and its own arguments weigh against it.

To start, as noted above, the TROs do not affect the government's ability to remove deportable individuals under federal laws other than the AEA or to detain and arrest anyone who is a threat to national or domestic security. So the only potential harm is the temporary inability to remove individuals under the AEA and Proclamation.

As to that limitation, the government agrees that individuals are entitled to challenge in court whether they fall within the terms of the AEA or are otherwise not lawfully removable under it. Oral Arg. 1:41:55-1:42:28, 1:42:50-1:43:12. Indeed, the government repeatedly points to unidentified habeas corpus litigation in Texas raising those very types of claims. Oral Arg. 19:46-20:10, 20:30-20:50, 22:14-22:20, 31:00-31:40.

Given that the government agrees that removal *can be delayed* to allow for due process review in habeas consistent

with national security, the same must be true in this courthouse. Certainly the government has given no reason that the delays occasioned by these TROs affect national security in a way different than the removal delays associated with the habeas corpus cases of which it procedurally approves. And, if the government were correct in concluding that AEA removal challenges could be brought in habeas, that litigation could afford the same relief from imminent removal sought here. So the government has not shown how the nature of the relief afforded in these TROs itself somehow impacts national security.

The government's last national security objection is that the district court's oral order on March 15th to turn around airplanes removing class members under the AEA was the equivalent of a court ordering a carrier group to redeploy from the South China Sea. Oral Arg. 1:03-1:12.

A TRO directing military deployments or maneuvers certainly would raise profound separation of powers questions warranting the most careful consideration and remediation. But nothing remotely like that happened here. The district court's TROs only directed immigration officials to preserve their custody, and thus the court's jurisdiction, over the Plaintiffs. The government does not dispute that the Plaintiffs on the non-military planes and the planes themselves were fully under its control at the time of the court's oral order. *See Munaf v. Geren*, 553 U.S. 674, 686 (2008) ("An individual is held 'in custody' by the United States when the United States official charged with his detention has 'the power to produce' him.") (quoting *Wales v. Whitney,* 114 U.S. 564, 574 (1885)); *see also Braden v. Thirtieth Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489 n.4 (1973) (petitioner can be "in custody" of an entity through that entity's agent); *Umanzor v. Lambert*, 782 F.2d 1299, 1302 (5th Cir. 1986) (stating that there was "little

difficulty in concluding" that habeas petitioner was "in custody" where petitioner "was under actual physical restraint by the government's agent—the airline" and noting that petitioner "was imprisoned inside of the aircraft, against his will, until the aircraft completed the flight and he was released[]").

Even more to the point, the government's persistent theme for the last ten days has been that the district court's oral direction regarding the airplanes was *not* a TRO with which it had to comply. *See* ECF No. 24 (Gov't Mot. to Vacate) at 2 ("[A]n oral directive is not enforceable as an injunction."); Mar. 17 Tr. 16:12-14 ("Oral statements are not injunctions and [] the written orders always supersede whatever may have been stated in the record[.]"); *id.* at 17:20-21 ("[O]ral statements are not injunctions[.]"); *see also* Mar. 21 Tr. 4:18-19, 6:4-5 (district court noting the government's position that the oral ruling was not binding); Oral Arg. 1:48:24-1:49:19.

I leave the merits of that argument for the district court to resolve in the first instance. But the one thing that is not tolerable is for the government to seek from this court a stay of an order that the government at the very same time is telling the district court is not an order with which compliance was ever required. Heads the government wins, tails the district court loses is no way to obtain the exceptional relief of a TRO stay.[5]

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[5] *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (A party may not "prevail[] in one phase of a case on an argument and then rely[] on a contradictory argument to prevail in another phase.") (citation omitted); *Solo v. United Parcel Serv. Co.*, 947 F.3d 968, 972 n.2 (6th Cir. 2020) (positions in district court and on appeal cannot be contradictory).

Next, the government claims that the TROs "risk[] scuttling delicate international negotiations" providing for the removal of Plaintiffs to Venezuela and El Salvador. Gov't Second Stay Mot. 9; ECF No. 26-2 (Kozak Decl.) ¶¶ 2-4. The government then says that "removal delayed tends to become removal denied." Gov't Reply 3.

But the government's arguments keep running into themselves. The government has no objection on diplomatic grounds to removal delays while individualized review of whether a noncitizen falls within the Proclamation's own terms is under way. At least as long as it is a habeas action. But once again, we are lacking any explanation as to why the Plaintiffs' APA claim challenging the government's across-the-board failure to allow any opportunity for that review is somehow a different strain on diplomatic relations. At bottom, the TROs' purpose is to ensure that justice is neither delayed nor denied to Plaintiffs.

In addition, the government does not explain why there would be any possible breakdown in diplomatic discussions over ensuring that removed individuals are, in fact, members of TdA. Surely the government claims no diplomatic interest in sending individuals to El Salvador or Venezuela who are *not* members of TdA and so are not covered by the Proclamation. *See* Proclamation § 1 (invoking authority over "Venezuelan citizens 14 years of age or older who *are* members of TdA") (emphasis added). I will not put the cart before the horse and rely on a harm that assumes the very fact Plaintiffs vigorously contest.

3

There is yet another (non-jurisdictional) procedural problem with the government's request for a stay. Appellate

Litigation 101 requires parties seeking a stay from this court to first request one from the district court. FED. R. APP. P. 8(a)(2); *Powder River Basin Res. Council v. United States Dep't of Interior*, No. 24-5268, 2025 WL 312649, at *1 (D.C. Cir. Jan. 24, 2025) (per curiam); *Teva Pharms. USA, Inc. v. Food & Drug Admin.*, No. 05-5401, 2005 WL 6749423, at *1 (D.C. Cir. Nov. 16, 2005) (per curiam).

The government is fully familiar with that requirement. In fact, the government routinely asks this court to dismiss stay requests by other parties for failure to seek a stay below, *see* Gov't Br. 9, *Vertical Aviation Int'l, Inc. v. Federal Aviation Auth.*, No. 25-1017 (D.C. Cir. Mar. 19, 2025); Gov't Br. 8, *Frontier Airlines, Inc. v. Department of Transp.*, No. 25-1002 (D.C. Cir. Feb. 6, 2025); Gov't Br. 10, *Bull v. Drug Enf. Agency*, No. 13-1279 (D.C. Cir. Nov. 20, 2013), and we commonly agree, *see Vertical Aviation Int'l, Inc. v. Federal Aviation Auth.*, No. 25-1017 at 1 (D.C. Cir. Mar. 19, 2025); *Frontier Airlines, Inc. v. Department of Transp.*, No. 25-1002 at 1 (D.C. Cir. Feb. 6, 2025); *Bull v. Drug Enf,. Agency*, No. 13-1279 at 1 (D.C. Cir. Nov. 20, 2013).

Yet the government completely failed to seek stays of the TROs from the district court at all. Not for lack of time. It has had more than a week to do so. And not for temporarily forgetting the requirement. It has openly flagged its noncompliance in its briefs. Gov't First Stay Mot. 4 n.1; Gov't Second Stay Mot. 8 n.1. There are occasional exceptions to seeking a stay in district court, but the government has argued none of them here.

I would deny the stay on this additional ground. The government needs to play by the same rules it preaches. And it needs to respect court rules.

B

While the government has not demonstrated a likelihood of establishing jurisdiction over its appeals and request for a stay of the TROs, a majority of this panel has concluded otherwise. Given that resolution, I address why the government's own threshold arguments challenging the district court's jurisdiction also are unlikely to succeed.

1

a

The government argues that Plaintiffs' case is non-justiciable because the Executive Branch's interpretation of the AEA as applying to the removal of members of a criminal gang is a judicially unreviewable political question. Gov't First Stay Mot. 4.

I note at the outset that the government's argument does not suggest that the Plaintiffs' *constitutional* entitlement to notice and some opportunity for pre-removal due process is a political question. So this argument by the government does not actually affect the district court's jurisdiction to enter the TROs.

Anyhow, political questions are decisions committed by the Constitution to the discretion of the Political Branches or lacking judicially manageable standards of review. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197-198 (2012) (*Zivotofsky I*). Although federal courts must account for prudential considerations when deciding whether an issue constitutes a political question, *see Baker v. Carr*, 369 U.S. 186, 217 (1962), the Constitution's assignment of responsibilities and the feasibility of judicial review are "the

most important" factors, *Schieber v. United States*, 77 F.4th 806, 810 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 688 (2024).

The gravamen of the government's position is that the President has total and unreviewable authority to decide whether the statutory prerequisites for invoking the AEA are met in Plaintiffs' case. This includes deciding whether TdA is a "foreign nation or government" and whether its actions amount to an "invasion or predatory incursion" into the United States. 50 U.S.C. § 21.

That argument is not likely to succeed. The judiciary, not the Executive, has the ultimate constitutional responsibility and capacity for saying what statutes and statutory terms mean.

Under the Constitution, federal courts are vested with the "judicial Power of the United States[,]" U.S. CONST. Art. III, § 1, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. "When the meaning of a statute [is] at issue, the judicial role [is] to 'interpret the act of Congress, in order to ascertain the rights of the parties.'" *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *Decatur v. Paulding*, 39 U.S. 497, 515 (1840)).

In addition, statutory interpretation is judicially manageable because it does not require courts to exercise "their own political judgment[.]" *Rucho v. Common Cause*, 588 U.S. 684, 705 (2019). Instead, the judicial "task is to discern and apply the law's plain meaning as faithfully" as possible. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021). Because questions about meaning are objectively discernible from statutory text and context, courts can decide them "by applying their own judgment." *Loper Bright*, 603 U.S. at 392.

That is why the "Supreme Court has never applied the political question doctrine in cases involving statutory claims of this kind." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 855 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment). Instead, the Court has emphasized that whether to "enforce a specific statutory right" is "a familiar judicial exercise," not a political question. *Zivotofsky I*, 566 U.S. at 196.

That remains true even if the statute's subject concerns foreign or military affairs. *Zivotofsky*, 566 U.S. at 196 (statutory right to passport designation implicating diplomatic status of Jerusalem is not a political question). Indeed, "[i]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Many legal questions arising from statutes involving foreign policy are not political questions.[6] And many cases require courts to decide whether the plaintiff has a statutory right based on terms like "war," "peace," and "hostilities" abroad. *See Lee v. Madigan*, 358 U.S. 228, 229 (1959); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 140-141 (1948); *Ludecke*, 335 U.S. at 166-167; *Al-Alwi v. Trump*, 901 F.3d 294, 300 (D.C. Cir. 2018).

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[6] *See Zivotofsky I*, 566 U.S. at 194; *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 229 (1986); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254 n.25 (1984); *Al-Tamimi*, 916 F.3d at 13; *Schieber*, 77 F.4th at 812; *Simon v. Republic of Hungary*, 812 F.3d 127, 150 (D.C. Cir. 2016), *abrogated on other grounds by Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021); *Wilson v. Libby*, 535 F.3d 697, 703-704 (D.C. Cir. 2008); *DKT Memorial Fund, Ltd. v. Agency for International Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987); *Population Institute v. McPherson*, 797 F.2d 1062, 1068 (D.C. Cir. 1986).

This case fits that same apolitical, statutory-construction mold. The parties disagree about the meaning of words. For example, relying on dictionaries from when the AEA was written, the plaintiffs argue that the word "invasion" means "entrance of a hostile army[.]" Pls' Br. 21 (citing Webster's Dictionary, *Invasion* (1828)). By contrast, the government cites a modern dictionary defining "invasion" as the "arrival somewhere of people or things who are not wanted[.]" Gov't First Stay Mot. 12 (citing Black's Law Dictionary, *Invasion* (12th ed. 2024)). The judiciary can resolve this disagreement with settled tools of statutory construction.

To be sure, other non-interpretive parts of the Proclamation may involve expert and discretionary judgments. For example, whether a criminal gang has infiltrated a foreign government so deeply that it has become a part of that government itself may well be a judgment for the Political Branches to make. *Cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 28 (2015) (deciding political status of Jerusalem is a political question); *Oetjen v. Century Leather Co.*, 246 U.S. 297, 302 (1918) (determining government of Mexico is a political question); *Jones v. United States,* 137 U.S. 202, 212 (1890) (determining sovereignty over Guano Islands is a political question); *Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009) (determining sovereignty over Taiwan is a political question); U.S. CONST. Art. II, § 3 (The President "shall receive Ambassadors and other public Ministers[.]"). But once those decisions are made, determining whether the political answer falls within the meaning of a statutory term is the job of the Judicial Branch.

b

The government's efforts to shoehorn the statutory interpretation questions in this case into the political-question doctrine are unlikely to succeed.

First, the government argues that the Supreme Court foreclosed judicial review of the AEA's meaning in *Ludecke*.

Actually, the Supreme Court said the opposite. *Ludecke*, which is the only Supreme Court case interpreting the AEA, said that courts may not "pass judgment upon the exercise of [the President's] discretion" when invoking the AEA. 335 U.S. at 164. But the discretion to which the Court referred was the President's judgment whether, in the conduct of a war, to invoke the Act and, if so, whether to remove, relocate, or just detain alien enemies. *Ludecke,* 335 U.S. at 164-169.

But the separate issue of what the AEA's text means is a question of law, not discretion. That is why the Supreme Court specifically held that the AEA's "interpretation and constitutionality" are matters to be decided by federal courts. *Ludecke,* 335 U.S. at 163-164. In fact, the central question resolved by the Supreme Court was whether the term "war" in Section 21 of the Act requires ongoing hostilities for the AEA to remain in force. *Id.* at 166-167. The Court engaged in statutory construction and held that, even if the shooting has stopped, the relevant state of "war" continues until the Political Branches terminate the Nation's state of war. *Id.* at 167-169. So *Ludecke* conclusively held—and showed—that interpreting

the meaning of the AEA's words falls within the Judicial Branch's wheelhouse.[7]

Second, the government maintains that whether there has been an "invasion or predatory incursion" of the United States and whether TdA is a "foreign nation or government" are committed to the President's discretion. Not likely.

For one, this case does not require the court to "supplant a foreign policy decision" with its own "unmoored determination of what United States policy" should be. *Zivotofsky I*, 566 U.S. at 196. Instead, the district court is assessing whether exceptional removal procedures are available for alleged members of TdA under the AEA. The Supreme Court addressed the same question for German nationals in *Ludecke*. 335 U.S. at 166-167. There, the Supreme Court decided what "war" means under the AEA. This case involves what the neighboring terms "invasion" and "incursion" mean. 50 U.S.C. § 21. How the President should combat the dangers posed by TdA, whether to treat TdA as an arm of the Venezuelan state, and whether to remove or detain qualifying TdA's members are not questions under review, any more than the President's conduct of World War II was under review in *Ludecke*. All the district court is deciding is whether the AEA permits the government to deny Plaintiffs all pre-removal notice and due process. Resolving that issue is a core judicial responsibility. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

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[7] The government also claims that this court held that AEA claims are non-justiciable in *Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946). Not so. *Citizens Protective League* ruled on the merits of a constitutional challenge to the AEA, concluding that the "Alien Enemy Act is constitutional[.]" *Id.* at 293. Any contrary suggestion in the opinion regarding the non-justiciability of statutory interpretation issues was superseded by *Ludecke*.

In addition, the government is mistaken about the extent of unilateral Executive authority under the Constitution. An assertion of exclusive Executive authority is "the least favorable of possible constitutional postures" and it runs aground here on the express constitutional assignment of relevant authority to Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J. concurring). For it is Congress that has the power to "repel Invasions[,]" U.S. CONST. Art. I, § 8, cl. 15, and retains "plenary authority" over noncitizens, *INS v. Chadha*, 462 U.S. 919, 940 (1983); *see* U.S. CONST. Art. I, § 8, cl. 4. While the "United States" must "protect each" state "against Invasion," nothing in the Constitution assigns this responsibility exclusively to the President. *Id.* Art. IV, § 4, and, in fact, Article I indicates otherwise, *id*. Art. I, § 8, cl. 15 (giving Congress the power to repel invasions).

To be sure, the President enforces laws that Congress makes on these subjects because the President must "take Care that the Laws be faithfully executed[.]" U.S. CONST. Art. II, § 3. But that authority is bounded by the statutory limits Congress has set in the AEA, and determining what those statutory terms mean is a judicial responsibility. *Id.* Art. III, § 1. This is so even for questions concerning war and international aggression. "From the very beginning" federal courts have determined "the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

The government argues lastly that, as a practical matter, the judiciary should not contradict the Executive's interpretation of the statute. Gov't First Stay Mot. 17-18. That sounds like an argument for the version of the AEA that Congress refused to enact, under which courts would simply

follow "the rules and directions which, in any proclamation or other public act, the President of the United States shall and may make[.]" 8 ANNALS OF CONG. 1786 (1798). Congress chose instead to enact an AEA that denied unchecked Executive authority and left an independent role for the courts. 50 U.S.C. § 23; *contrast An Act Concerning Aliens*, ch. 58, § 1, 1 Stat. 571 (1798) (granting the President discretion to remove any alien he "judge[d] dangerous to the peace").

In any event, the government identifies no prudential reasons the district court or this court should shrink back in this case. The government has not identified any conflict with "the other *two* branches" at all, *Al-Tamimi*, 916 F.3d at 12 (emphasis added). Nor, at this pre-merits stage, has the government explained why the district court's preservation of the status quo so that the Plaintiffs can obtain the due process review (which the government agrees they can have) crosses any prudential lines. Something "more is required" for a political question than mere "inconsistency between a judicial decision and the position of" an Administration. *Id.*

2

a

Equally unavailing is the government's suggestion that the District of Columbia is the incorrect location for this suit. The government argues that, because the Plaintiffs' "claims sound in habeas" and the "only proper venue" for a habeas petition is the venue where a detainee is being held, Plaintiffs must sue in Texas—not the District of Columbia. Gov't First Stay Mot. 8.

At the outset, to the extent the government is arguing that Plaintiffs' failure to file in the district of detention deprives the district court of subject matter jurisdiction, that argument has

no purchase. In a habeas petition, the place of detention matters for personal jurisdiction or venue, but not for subject matter jurisdiction. *See Braden*, 410 U.S. at 493 (applying "traditional venue considerations" to identify the correct forum for a habeas suit); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 434 n.7 (2004) (referring to "jurisdiction" as used in the habeas statute, "not in the sense of subject-matter jurisdiction of the District Court"); *id.* at 451 (Kennedy, J., concurring) ("[T]he question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue.").

But the government's argument flounders for a more fundamental reason. Plaintiffs' claims are not habeas claims and do not sound in habeas. Their complaint originally included one count alleging their detention violated the right to habeas corpus. ECF No. 1 (Complaint) ¶¶ 105-106. But the district court has since granted Plaintiffs' motion to dismiss that count from the complaint, Mar. 15. Tr. 22:23-25, and the rest of Plaintiffs' claims are routine APA claims.

Habeas corpus is the proper vehicle for challenges to the legality of custodial *detention*, not the proper vehicle for a petitioner to "claim the right to * * * remain in a country or to obtain administrative review potentially leading to that result." *DHS v. Thuraissigiam*, 591 U.S. 103, 117 (2020). The Supreme Court has been crystal clear on this point: "The writ simply provide[s] a means of contesting the lawfulness of restraint and securing release" from detention. *Id.*

In *Thuraissigiam*, a noncitizen in detention sought a writ of habeas corpus to prevent his deportation to Sri Lanka. The Court held that he could not pursue his claim through habeas because he sought, in many ways, the opposite of release from detention. 591 U.S. at 119. "[T]he Government [wa]s happy to release him—provided the release occur[red] in the cabin of

a plane bound for Sri Lanka." *Id.* But, because Thuraissigiam wanted instead "the opportunity to remain lawfully in the United States[,]" his requested relief fell "outside the scope of the writ[.]" *Id.*

Likewise, in *Munaf*, American citizens in U.S. custody in Iraq during military operations there filed habeas petitions to prevent their transfer to Iraqi authorities for criminal prosecution. 553 U.S. at 692. The Supreme Court held that their "claims do not state grounds upon which habeas relief may be granted." *Id.* "Habeas is at its core a remedy for unlawful executive detention[,]" and "[t]he typical remedy for such detention is, of course, release." *Id.* at 693. Because the "last thing" the petitioners in *Munaf* wanted was "simple release"—"that would expose them to apprehension by Iraqi authorities for criminal prosecution"—they could not press their claims through a habeas action. *Id.* at 693-694.

Like the plaintiffs in *Thuraissigiam* and *Munaf*, Plaintiffs here do not seek release from detention; they want to stay in detention in the United States. The gravamen of their complaint is that the government cannot implement the President's proclamation by removing them from the United States and releasing them into the custody of a foreign sovereign, especially without affording them basic due process. *See* ECF No. 1 (Complaint) ¶¶ 71-73. In other words, the "last thing" Plaintiffs want is release from U.S. detention, *Munaf*, 553 U.S. at 693.

b

Given that precedent, the Plaintiffs' APA action is an appropriate vehicle for the challenges they raise to the defendant agencies' implementation of the Proclamation without notice and due process. Unless otherwise precluded by

statute, the APA generally provides a cause of action to challenge removals outside of the immigration laws. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *see Robbins v. Regan*, 780 F.2d 37, 42 (D.C. Cir. 1985) ("[J]urisdiction over APA challenges to federal agency action is vested in district courts unless a preclusion of review statute * * * specifically bars judicial review in the district court."); *see also* 8 U.S.C. § 1252(g) (stripping courts of jurisdiction to review, as relevant here, removal orders under Title 8, Chapter 12).

Nothing in the AEA forecloses judicial review of an alleged enemy alien's claim that removal would be unlawful. Quite the opposite, Section 23 expressly provides for judicial review of claims raised by persons before the court. And the AEA, of course, is not part of Title 8, Chapter 12, and so is not subject to Section 1252(g)'s jurisdiction stripping.

We recently reached that same conclusion in *Huisha-Huisha*. There, asylum seekers in detention in Texas challenged the Executive's use of 42 U.S.C. § 265, a public health statute, to expel them from the United States. 27 F.4th at 723-724, 726-727, 733. The asylum seekers argued that the use of Section 265 was "contrary to law" under the APA and was improperly implemented by the agency. Compl. ¶¶ 74-79, 83-84, 101-102, *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). The government did not argue that there was any jurisdictional impediment to APA review, and we found none.

Plaintiffs' suit here fits the APA bill as well. Instead of the Executive using Section 265 to justify removals, it relies on the Alien Enemies Act. But, because the AEA is outside Chapter 12 of the U.S. Code, plaintiffs may challenge their removals under the APA.

As the government does not dispute, venue for Plaintiffs' APA claims is proper in the District of Columbia. It is the judicial district where defendants—agencies and officers of the United States—reside. *See* 28 U.S.C. § 1391(e)(1) ("A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity * * * may * * * be brought in any judicial district in which [] a defendant in the action resides[.]").[8]

c

The government's insistence that Plaintiffs' claims can only proceed through habeas, and not under the APA, is not likely to succeed either.

First, the government is wrong that "review of AEA enforcement lies only in habeas[.]" Gov't Second Stay Mot. 21. Our decision in *Citizens Protective League* shows otherwise. There, we entertained non-habeas "civil actions"

[8] Even if Section 1252(g) barred individual plaintiffs from relying on the APA to challenge their individual removals, it would not bar Plaintiffs' class-wide challenge to the procedures—or lack thereof—by which removals are being effectuated. Section 1252(g)'s reference to a "decision or action[,]" 8 U.S.C. § 1252(g), "describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993) (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492 (1991) (analyzing similar language in 8 U.S.C. § 1255). That language therefore "describes the denial of an individual application," and so "applies only to review of denials of individual * * * applications." *Id.* (quoting *McNary*, 498 U.S. 479 at 492). For that reason, both *Reno* and *McNary* found district courts had jurisdiction over class-wide challenges to the procedural implementation of immigration processes. *Id.* at 55-56; *McNary*, 498 U.S. at 491-494.

brought by 159 German nationals and a non-profit organization to challenge removals under the AEA. *Citizens Protective League*, 155 F.2d at 291.

Outside the context of the AEA, the Supreme Court has also not required plaintiffs to use habeas when they do not challenge detention. The Court has never "recognized habeas as the sole remedy where the relief sought would not terminate custody, accelerate the date of release, or reduce the custody level." *Skinner v. Switzer*, 562 U.S. 521, 534 (2011). To the contrary, when the relief sought is simply to "stay" in the United States, that relief "falls outside the scope of the writ[.]". *Thuraissiggiam*, 591 U.S. at 119.

Second, the government relies on *LoBue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996), to argue that, so long as Plaintiffs could have petitioned for habeas to secure the relief they seek, no other cause of action is available. *Thuraissiggiam* and *Munaf* establish that habeas relief is not available in this context, so the government's *LoBue* argument is beside the point.

LoBue is off point for another reason. In that case, two plaintiffs detained in Illinois for extradition to Canada filed habeas corpus actions in Illinois and then a separate APA suit in the District of Columbia. They argued that the extradition laws were unconstitutional. *Id.* at 1081-1083. This court rejected the plaintiffs' attempt to make an end-run around habeas. Because success in their declaratory suit would have "preclusive effect" on their concurrently filed habeas petitions and so would secure their release from confinement, it did not matter that the plaintiffs did not "formally s[eek] a release from custody" in this court. *Id.* at 1083.

Plaintiffs, by contrast, are not manipulating anything. The government's implementation of the Proclamation gave no individual notice or any time at all to file suit to challenge their removal. Only a swift class action could preserve the Plaintiffs' legal rights before the rushed removals mooted their cases and thrust them into a Salvadorean prison. So success in this suit would not secure Plaintiffs' release from U.S. custody—the remedy they could secure through habeas petitions. Success would maintain their federal custody.

Even on its own terms, *LoBue* has no bearing on this case. *LoBue* concerned extradition, not removal, and this court specifically distinguished an extradition challenge from Supreme Court precedent "allowing an alien subject to a deportation order to seek relief by way of a declaratory judgment action." 82 F.3d at 1083.

IV

On top of the threshold jurisdictional barriers to our appellate jurisdiction and to the government's ability to succeed on the merits of its own jurisdictional objections to the district court's TROs, the other stay factors weigh against the government.

One of the "most critical" factors for a stay is "whether the applicant will be irreparably injured[.]" *Nken*, 556 U.S. at 434. The government's argument for irreparable injury does not hold up on this record.

According to the government, the district court's TROs interfere with the President's authority to execute the law and to oversee foreign affairs. Yet the government conceded at oral argument that all Plaintiffs in the class are entitled to submit habeas petitions in the district of their confinement challenging

whether they are members of TdA. Oral Arg. 19:51-20:14, 56:16-56:26, 1:41:55-1:42:28, 1:42:50-1:43:12. Even assuming Plaintiffs' claims to remain in detention could be pressed under habeas, any such habeas proceeding would allow them to obtain the same relief they seek here—review of their eligibility for removal under the Proclamation. And so the government's preference for habeas proceedings would produce at least the same restriction on the President's authority to remove the Plaintiffs that the TROs impose.

In other words, the Executive Branch's asserted injury is actually just a dispute over which procedural vehicle is best situated for the Plaintiffs' injunctive and declaratory claims. The Executive Branch prefers 300 or more individual habeas petitions in Texas and wherever else Plaintiffs are detained to this class APA case in Washington D.C. Regardless of whether the government is entitled to a different venue and procedural vehicle, an assertion of a "procedural right *in vacuo*" does not amount to irreparable injury warranting immediate emergency relief. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

In addition, the TROs create no risk to the public. The TROs only prevent the Executive from removing alleged members of TdA who are already detained under the AEA. Second Minute Order (Mar. 15, 2025). The Executive remains free to take TdA members off the streets and keep them in detention. The Executive can also deport alleged members of TdA under the INA in expedited fashion if the government can prove they committed a serious crime, 8 U.S.C. § 1228(a), or are terrorists, 8 U.S.C. §§ 1531-1537.

Finally, there is the more basic question of whether any of the Plaintiffs are, in fact, members of TdA. The Plaintiffs vigorously argue that they have nothing to do with this gang.

See ECF No. 3-3 (J.G.G. Decl.) ¶ 3; ECF No. 44-11 (Carney Decl. for G.F.F.) ¶ 3; ECF No. 44-12 (Smyth Decl. for J.A.V.) ¶¶ 9, 11; ECF No. 3-6 (W.G.H. Decl.) ¶ 12; ECF No. 44-9 (Shealy Decl. for J.G.O.) ¶ 4.[9]

At the same time, the injury to the Plaintiffs is great and truly irreparable. They face immediate removal on grounds that they say have no application to them and yet their claims have never been heard. And the removals under the AEA thus far have been not to their home countries, but directly into a Salvadorean jail reported to have a notorious reputation for human rights abuses and disappearances. ASSOCIATED PRESS, *What to know about CECOT, El Salvador's mega-prison for gang members*, (Mar. 17, 2025), https://perma.cc/7WER-NB7G.

Worst of all, the government has confessed that its preference that Plaintiffs use habeas corpus to challenge their eligibility for AEA removal is a phantasm: The government's position at oral argument was that, the *moment* the district court TROs are lifted, it can *immediately* resume removal flights without affording Plaintiffs notice of the grounds for their removal or any opportunity to call a lawyer, let alone to file a writ of habeas corpus or obtain any review of their legal challenges to removal. Oral Arg. 1:44:04-1:45:51. It is irreparable injury to reduce to a shell game the basic lifeline of due process before an unprecedented and potentially irreversible removal occurs.

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[9] The lack of irreparable injury to the government is also the reason for denying the government's request for mandamus relief. Mandamus is inappropriate when the normal appellate process is adequate to address the government's injury. *In re Flynn*, 973 F.3d 74, 78 (D.C. Cir. 2020) (en banc) ("A petition for a writ of mandamus 'may never be employed as a substitute for appeal.'") (quoting *Will v. United States*, 389 U.S. 90, 97 (1967).

V

Over one-hundred-and-fifty years ago, the Supreme Court addressed whether civilian courts could be closed just because the Executive declared an emergency. The Court said no.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Ex parte Milligan, 71 U.S. 2, 120-121 (1866).

The government's removal scheme denies Plaintiffs even a gossamer thread of due process, even though the government acknowledges their right to judicial review of their removability. The district court's temporary restraining orders have appropriately frozen the status quo until an imminent motion for preliminary injunction is filed. The district court acted well within its discretion in doing so. We lack jurisdiction to review the government's motion to stay those orders, and the government's jurisdictional objections to the district court's actions do not raise a substantial question at this stage.

For all of the foregoing reasons, I agree that the government's motions for stays must be denied.

WALKER, *Circuit Judge*, dissenting:

Tren de Aragua is a violent criminal organization linked to Venezuela. The President invoked the Alien Enemies Act of 1798 to remove its members from our country.[1] Venezuelan nationals alleged to be members of this group were swiftly sent to a detention center in Texas for summary removal.[2]

Five individuals confined at that Texas facility quickly sued the President here in Washington, D.C. They say that the President exceeded his authority under the Act. They also say they're not members of Tren de Aragua.[3]

The two sides of this case agree on very little. But what is at this point uncontested is that "individuals identified as alien enemies . . . may challenge that status in a habeas petition."[4]

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[1] Presidential Proclamation, *Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua* (March 15, 2025) (the "Proclamation") (citing the Alien Enemies Act, 50 U.S.C. § 21, et seq., 1 Stat. 577, 577-78 (1798)).

[2] *See* Complaint, ECF 1, at 3-5 ¶¶ 9-13, *J.G.G. et al. v. Trump, et al.*, No. 1:25-cv-00766 (D.D.C. Mar. 15, 2025).

[3] *See* Plaintiffs' Response to Motion to Vacate TRO, ECF 44, at 7 ("all five of the named Plaintiffs dispute that they are members of the TdA [i.e., Tren de Aragua]." (citing declarations)).

[4] Government's Reply in Support of Emergency Appeal, at 14; *see also* Oral Arg. at 17:38 – 21:33, *available at* youtube.com/live/4DoTLGECQSU.

In other words, according to the Government, the door to the federal courthouse in Brownsville, Texas is open, and the Government has not represented that it will affirmatively prevent a detainee from seeking emergency habeas relief in his district of confinement if he tries to do so. In fact, despite the Government's haste, and notwithstanding Plaintiffs' allegations of underhanded conduct, deportees *have* managed nonetheless to file petitions for habeas corpus both here and in the Southern District of Texas. *Cf.*

The problem for the Plaintiffs is that habeas claims must be brought in the district where the Plaintiffs are confined. For the named Plaintiffs at least, that is the Southern District of Texas. Because the Plaintiffs sued in the District of Columbia, the Government is likely to succeed in its challenge to the district court's orders.

The Government has also shown that the district court's orders threaten irreparable harm to delicate negotiations with foreign powers on matters concerning national security. And that harm, plus the asserted public interest in swiftly removing dangerous aliens, outweighs the Plaintiffs' desire to file a suit in the District of Columbia that they concede they could have brought in Texas — and that longstanding legal principles regarding habeas require them to have brought in Texas.

The Government has met its burden, so we should grant the stay pending appeal.

I. The District Court's Orders Are Appealable Orders.

We must have jurisdiction before we consider an appeal. Temporary restraining orders ordinarily aren't appealable.[5] But the district court's extraordinary orders here are.

I.M. v. United States Customs & Border Protection, 67 F.4th 436, 444 (D.C. Cir. 2023) (brief custody of a few weeks would not "all but prevent judicial review of expedited removal orders").

[5] *OPM v. American Federation of Government Employees, AFL-CIO*, 473 U.S. 1301, 1303-04 (1985) ("denials of temporary restraining orders are ordinarily not appealable").

It's fair to ask why this is "the established rule." *Id.* After all, we have appellate jurisdiction to review orders "granting . . . injunctions, or refusing to dissolve or modify injunctions," 28 U.S.C. § 1292(a)(1), and "TROs almost certainly fall within the historical

Operating under intense time pressure, the district court granted a temporary restraining order preventing the removal of the named plaintiffs, then quickly certified a class of "all noncitizens in U.S. custody who are subject to the . . . Proclamation,"[6] and then granted a temporary restraining order that "enjoined" the Government "from removing members of [that] class."[7] Together, these orders amounted to an injunction that halted the President's effort to implement his Proclamation — the success of which depends on "delicate negotiations" with "foreign interlocutors."[8]

The district court's extraordinary injunctions are appealable. Although the district court "styled" each of them as "a temporary restraining order," that "label . . . is not decisive."[9] What matters is what it did. And far from "merely

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and modern definitions of 'injunction.'" Tyler B. Lindley, Morgan Bronson & Wesley White, *Appealing Temporary Restraining Orders* (BYU Law Research Paper No. 25-06), 77 Fla. L. Rev. (forthcoming 2025) (manuscript at 3), https://perma.cc/Q2JB-FC93. It appears likely that the rule is no product of "textualist reasoning," but rather a vestige of case law dissociated from important statutory history. *Id.* Even so, we're bound by that case law until the Supreme Court tells us otherwise.

[6] Minute Order Granting Motion for Class Certification.

[7] *Id.*

[8] Government's Emergency Motion for a Stay Pending Appeal at 26-27 ¶¶ 2-4 (Declaration of Michael G. Kozak).

[9] *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978) (quoting Wright & Miller, Federal Practice and Procedure § 2962, at 619 (1973)).

Relatedly, district courts have halted executive actions under the guise of "administrative stays." *See, e.g.*, Minute Order, *Dellinger v. Bessent*, No. 25-cv-385 (D.D.C. Feb. 10, 2025) (administrative stay reinstating terminated official). But again, what matters is not how an order is labeled, but how it functions. These so-called

preserv[ing] the status quo pending further proceedings," the district court's orders affirmatively interfered with an ongoing, partially overseas, national-security operation.[10]

In *Adams v. Vance*, we held that when a district court's temporary order threatens "intrusion on executive discretion in the field of foreign policy," its order is immediately reviewable.[11] That's the case here. The district court told the Executive Branch to immediately stop executing a plan to repatriate or remove Venezuelan nationals pursuant to "[a]rrangements [that] were recently reached" with El Salvador and "representatives of the Maduro regime."[12] Not only that, the district court "commanded an unprecedented action" from the bench: The district judge ordered aircraft to be turned around mid-flight in the middle of this sensitive ongoing national-security operation.[13]

"'administrative stays' are not actually stays at all, administrative or otherwise. They are injunctions." Chris D. Moore, *So-Called "Administrative Stays" in Trump 2*.0, 104 Tex. L. Rev. Online (forthcoming 2025) (manuscript at 3), https://perma.cc/6DUP-9N7P.

[10] *Adams*, 570 F.2d at 952.

[11] *Id.*

[12] Kozak Declaration ¶ 3.

[13] Class Certification Hearing Tr. at 43:12-15, 43:18-19 (Mar. 15, 2025) ("[A]ny plane containing [putative plaintiff class members] that is going to take off or is in the air needs to be returned to the United States . . . . [T]hose people need to be returned to the United States. . . . [T]his is something that you need to make sure is complied with immediately."); *cf. Al-Bihani v. Obama*, 619 F.3d 1, 12 n.1 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) ("Even when this Court might disagree with a District Court decision, that disagreement is with respect and appreciation for the dedicated work of the District Court on these matters.").

"When an order directs action so potent with consequences so irretrievable, we provide an immediate appeal to protect the rights of the parties."[14] The district court's orders here threaten an "irreversibl[e] altering [of] the delicate diplomatic balance" that high-level Executive officials recently struck with foreign powers.[15]

In a sworn declaration, the Senior Bureau Official for Western Hemisphere Affairs tells us, based on his "extensive experience since 1971 engaging in" diplomacy involving "El Salvador, Venezuela, and other countries in the region," that there is a serious risk that our diplomatic counterparts will "change their minds regarding their willingness to accept certain individuals associated with [Tren de Aragua]."[16] He also flags the risk that foreign negotiators will "seek to leverage" the delay "as an ongoing issue."[17]

As we've cautioned before, "[c]ourts must beware 'ignoring the delicacies of diplomatic negotiation.'"[18] So we can't ignore a declaration warning that these "harms could arise

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[14] *Adams*, 570 F.2d at 953; *see also Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *13 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting) ("TROs themselves sometimes inflict irreparable injury, and in those cases an immediate appeal is available to avoid it.").

[15] *Adams*, 570 F.2d at 953; *see* Kozak Declaration ¶¶ 2-3 (explaining that Secretary of State and other high-ranking White House and State Department officials "negotiated at the highest levels with the Government of El Salvador and with Nicolas Maduro and his representatives in Venezuela in recent weeks").

[16] Kozak Declaration ¶¶ 1, 4.

[17] *Id.* ¶ 4.

[18] *Adams*, 570 F.2d at 954 (quoting *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973)).

even in the short term."[19] It's no answer, therefore, to say that the district court's temporary restraining orders last only 14 days (or perhaps another 14 days after that).[20] That's more than enough time to frustrate fast-moving international negotiations.

In sum, the "extraordinary character of the order[s] at issue here . . . warrant[ ] immediate appellate review."[21]

* * *

There remains one procedural wrinkle to iron out before turning to the merits. A stay applicant must "ordinarily move first in the district court" for a stay pending appeal.[22] But here the Government didn't do so.

That doesn't preclude our review. The Federal Rules of Appellate Procedure expressly provide that an applicant may bypass that step if it shows "that moving first in the district court would be impracticable."[23] Here, the Government cited extremely exigent circumstances that made it "impracticable" to move first in the district court.[24] And it filed emergency motions in our Court *mere hours* after each temporary restraining order issued — a testament to its view of the harm

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[19] Kozak Declaration ¶ 4.

[20] *See* Fed. R. Civ. P. 65(b)(2) (district court may, "for good cause," "extend" a 14-day TRO for "a like period").

[21] *Dellinger*, 2025 WL 559669, at *12 (Katsas, J., dissenting).

[22] Fed. R. App. P. 8(a)(1)(A).

[23] *Id.* R. 8(a)(2)(A)(ii); *see also* D.C. Cir. R. 8(a) ("motion seeking emergency relief must state whether such relief was previously requested from the district court and the ruling on that request").

[24] *See* First Emergency Stay Motion, at 4 n.1 (citing the "importance of the issues involved" and "the fast-moving nature of this case"); Second Emergency Stay Motion, at 8 n.1 (same).

that the temporary restraining orders inflict on the Executive Branch every hour that they remain in effect.[25] The Government's sidestepping of the district court under these circumstances is no impediment to our review.[26]

Because this appeal is properly before us, I now consider the stay factors, beginning with the Government's likelihood of success on the merits.[27]

II. The Government Is Likely To Succeed On The Merits Because The Plaintiffs Cannot Sue In The District of Columbia.

The Government is likely to succeed on appeal for a technical, but important, reason: The Plaintiffs' claims sound in habeas, and habeas petitions must be brought where detainees are held. For the five named Plaintiffs, that is the Southern District of Texas.

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[25] The district court issued the first TRO (applicable only to the named plaintiffs) at 9:40 AM, and the Government filed its 15-page emergency stay motion at 3:05 PM — less than six hours later. The district court's second TRO issued at 7:25 PM, and the Government filed its 22-page emergency stay motion, plus a two-page State Department declaration, at 1:04 AM — less than five hours later.

[26] Even if the Government's approach were procedurally irregular, the Plaintiffs have forfeited that argument by failing to raise it. *See generally* Plaintiffs' Brief in Response to Stay Motion.

[27] *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (stay factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies").

8

A. The Plaintiffs' Proper Cause Of Action Is A Habeas Petition.

The Plaintiffs' complaint raises various claims for relief. But what's their "cause of action"?[28] On what basis do they invoke federal courts' remedial power?

Many of the Plaintiffs' claims rely on the Administrative Procedure Act. The APA provides a cause of action to anyone "suffering legal wrong because of agency action."[29] The Plaintiffs allege that the President's Proclamation is "contrary to law" under the APA, because it stretches the meaning of the Alien Enemies Act and violates several other statutes.[30]

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[28] *Cf. Trudeau v. FTC*, 456 F.3d 178, 188 n.15 (D.C. Cir. 2006) ("a 'cause of action' [is] the legal authority (e.g., the APA) that permits the court to provide redress for a particular kind of 'claim.'").

[29] *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

Plaintiffs' eighth claim for relief asserts their rights under the Fifth Amendment's Due Process Clause. Complaint, ECF 1, at 22 ¶¶ 101-04. Though "we have long held that federal courts may in some circumstances grant injunctive relief . . . with respect to violations of federal law by federal officials," that cause of action is not available when a habeas petition is available. *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326-27 (2015); *see also Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973).

[30] Complaint, ECF 1, at 17 ¶¶ 71-73 (citing 5 U.S.C. § 706(2)(A)); *id.* at 19-20 ¶¶ 97-100 (same); *id.* at 19 ¶ 83 (same); *id.* at 17-18 ¶ 86 (same); *id.* at 18 ¶¶ 78-79 (same); *id.* at 20 ¶ 90 (same).

Implementing the Proclamation, they add, is "arbitrary and capricious" — the quintessential APA challenge.[31]

But the APA is not the right vehicle for two reasons. First, it provides review only when there is "no other adequate remedy in a court."[32] As I will explain below, another avenue for review is available here — a petition for habeas corpus.

Second, the Proclamation here is not an "agency action." It is a Presidential Proclamation. And the "President is not an agency."[33] So the APA does not authorize review of the Proclamation. Where the "final action complained of is that of the President" — here, the President's Proclamation under the Alien Enemies Act — the APA does not provide a basis for judicial review.[34]

How are the Plaintiffs supposed to bring their claims for relief, if not via the APA? The answer appears in the very title of their own complaint: "PETITION FOR WRIT OF HABEAS

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[31] *Id.* at 20-21 ¶¶ 93-95 (still citing 5 U.S.C. § 706(2)(A)). Plaintiffs made sure to "except Defendant Trump" from *this* claim for relief, which is titled "Violation of the Administrative Procedure Act."

[32] 5 U.S.C. § 704.

[33] *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

[34] *Id.*

The Plaintiffs might respond that part of their complaint challenges lower-level decisions by executive officials about whether a particular plaintiff is a member of Tren de Aragua — a decision not made by the President. But that type of challenge is unique to each plaintiff, so it would seem that a class action is a poor vehicle for that type of challenge.

CORPUS."[35] In that complaint, "Plaintiffs respectfully pray this Court to . . . Grant a writ of habeas corpus to Plaintiffs that enjoins Defendants from removing them under the [Alien Enemies Act]."[36]

Regardless of whether that would have been a paradigmatic habeas claim when habeas was first developed, it is now. The Plaintiffs face imminent removal by Proclamation of the Executive. They resort to court to challenge the legal and factual grounds for their threatened removal. And if they win the argument, they cannot be summarily removed.

"At its historical core, the writ of habeas corpus" serves "as a means of reviewing the legality of Executive detention."[37] Indeed, its most central "historic purpose" was "to relieve detention by executive authorities *without judicial trial*."[38] This "great and efficacious writ" did so by requiring the custodian to "produce the body of the prisoner" to the "judge or court" and provide a "satisfactory excuse" for the prisoner's detention.[39]

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[35] Complaint, ECF 1, at 1; *see* 28 U.S.C. § 2241 (federal habeas statute).

[36] *Id.* at 21.

[37] *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), *abrogated on other grounds by statute*, *see* REAL ID Act of 2005, 119 Stat. 310, 8 U.S.C. § 1252(a)(5); *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020) (acknowledging *St. Cyr*'s statutory abrogation).

[38] *St. Cyr*, 533 U.S. at 301 (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953)) (emphasis added).

[39] Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 687-88 (Chase, ed. 1882).

As Blackstone put it, the great writ remedies "*all manner* of illegal confinement."[40] So habeas is used to challenge the *place* of confinement. Consider *In re Bonner*.[41] There, the Supreme Court granted habeas to a petitioner who was subject to imprisonment on a valid jury verdict.[42] Bonner's *only* complaint was that he was "unlawfully deprived of his liberty" by his placement in the wrong penitentiary. (By statute, he should have been imprisoned somewhere else.) That Bonner could (and *should*) have been confined *elsewhere* was no impediment to seeking a writ of habeas corpus. Indeed, the Court even said that "[t]o deny the writ of *habeas corpus* in such a case" would be "a virtual suspension of [the writ]."[43] After all, "a place of confinement challenge . . . *unquestionably* sounds in habeas."[44]

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[40] *Id.* at 687 (emphasis added); *see also DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1981 (2020) ("The writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials, and the Court had held long before that the writ could be invoked by aliens already in the country who were held in custody pending deportation.").

As an aside, *Thuraissigiam* is of no help to the Plaintiffs here. Thuraissigiam was not making a core habeas challenge to his removal; instead, he was seeking affirmative administrative relief. *See Thuraissigiam*, 140 S. Ct. at 1969-71, 1974, 1981 (rejecting a petitioner's "very different attempted use of the writ" to seek "quite different relief" than traditionally available in habeas — namely, the "authorization for an alien to remain in a country other than his own" and "to obtain administrative or judicial review leading to that result").

[41] 151 U.S. 242, 262 (1894).

[42] *See In re Bonner*, 151 U.S. 242, 262 (1894).

[43] *Id.* at 259-60 (emphasis added).

[44] *Aamer v. Obama*, 742 F.3d 1023, 1035 (D.C. Cir. 2014) (emphasis added); *see, e.g.*, *Creek v. Stone*, 379 F.2d 106, 109 (D.C. Cir. 1967)

Another use of habeas is to challenge *transfer* from one place of detention to a different location. For instance, in *Kiyemba v. Obama*, Guantanamo detainees challenged — in habeas — their anticipated transfer to another country.[45] We deemed "a potential transfer out of the jurisdiction" to be "a proper subject of statutory habeas relief," and we rejected an argument by the Government that "the right to challenge a transfer is 'ancillary' to and not at the 'core' of habeas corpus relief."[46] If habeas was the proper cause of action there — where detainees *feared* continued detention after removal — habeas is all the more the proper cause of action here, where the Plaintiffs *will* continue to be detained after removal.[47]

To be sure, *Kiyemba* did not grant habeas relief. But that is because the detainees failed "on the merits of their present claim."[48] That decision was controlled by *Munaf v. Geren*.[49]

Munaf was in Iraq and had broken Iraqi law, and the U.S. was planning to transfer him from U.S. custody to Iraqi

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("habeas corpus is available *not only* to an applicant who claims he is entitled to be freed of *all* restraints, but *also* to an applicant who protests his confinement *in a certain place*." (emphases added)); *id.* at 108-11 (habeas appropriate for statutory challenge to convicted juvenile's confinement in a receiving home rather than an appropriate psychiatric facility); *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953) (habeas petition brought by a man confined to a ward for the criminally insane who said he belonged instead in an institution for the mentally ill).

[45] 561 F.3d 509, 511 (D.C. Cir. 2009).

[46] *Id.* at 513.

[47] *See id.* ("likely" to be detained).

[48] *Id.* at 514.

[49] 553 U.S. 674 (2008).

custody. The Supreme Court first held that the lower court had habeas jurisdiction. The Court then held that, on the merits, the habeas claim failed because the Court could not interfere with a foreign criminal system. In other words, *on the merits* of whether the transfer was lawful, it was lawful because Iraq had "exclusive jurisdiction to punish offenses against its laws committed within its borders."[50]

Munaf's reason for denying the habeas petition was *not* that habeas cannot be used to enjoin a detainee's transfer as a general matter. If habeas was not the proper vehicle to bring the merits claim opposing the transfer in *Munaf*, the Court would not have been able to do what it did — reach the merits of that habeas claim.[51]

Myriad cases also show that challenges to extradition and deportation are properly brought in habeas. In *LoBue v. Christopher*, we said habeas was a vehicle to challenge extradition statutes, as had the Supreme Court over a century earlier.[52] Regardless of changes to immigration statutes, habeas has long been used to bring removal challenges — indeed, "[u]ntil the enactment of the 1952 Immigration and Nationality Act," "bringing a habeas corpus action in district

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[50] *Id.* at 697.

[51] *Cf. In re Bonner*, 151 U.S. 242, 262 (1894) (granting habeas writ to petitioner who claimed he was imprisoned in the wrong penitentiary).

[52] 82 F.3d 1081, 1082-84 (D.C. Cir. 1996); *Ward v. Rutherford*, 921 F.2d 286, 288 (D.C. Cir. 1990) (Ginsburg, R.B., J.) ("actions taken by magistrates in international extradition matters are subject to habeas corpus review by an Article III district judge"); *Benson v. McMahon*, 127 U.S. 457, 462 (1888) (habeas used to challenge to extradition).

court" was "the *sole* means by which an alien could test the legality of his or her deportation order."[53]

The upshot is that habeas and removal challenges go hand-in-glove, and statutory developments since the late nineteenth century do not affect this key point.[54] That's because the summary removals challenged here are premised upon the President's authority under an eighteenth-century law. That law has not been repealed, expressly or impliedly, by later immigration laws. And the specific controls the general.[55]

It is noteworthy that the few Alien Enemies Act cases on the books almost invariably arose through habeas petitions: Both of the two Alien Enemies Act cases to reach the Supreme Court — *Ludecke v. Watkins* and *Ahrens v. Clark* — arose via habeas petitions.[56] In *Ahrens*, for example, the Supreme Court held that District of Columbia federal courts had no jurisdiction to hear habeas claims challenging confinement in New York for deportation to Germany under the Alien Enemies Act.[57]

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[53] *St. Cyr*, 533 U.S. at 306; *see also Heikkila v. Barber*, 345 U.S. 229, 235 (1953) (rejecting challenge to deportation order under the APA because plaintiff "may attack a deportation order *only* by habeas corpus").

[54] *Cf. DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1971-75 (2020) (looking to the historical understanding of the scope of the writ as the touchstone for Suspension Clause analysis).

[55] *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (2012).

[56] *See generally Ludecke v. Watkins*, 335 U.S. 160 (1948); *Ahrens v. Clark*, 335 U.S. 188 (1948).

[57] 335 U.S. at 192-93 ("the jurisdiction of the District Court to issue the writ in cases such as this [i.e., AEA habeas petitions] is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court"). A later case, *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), overturned part of

Likewise, for cases in the lower courts, habeas was often the vehicle for aliens designated as enemies to challenge their designation and prevent their removal.[58]

That may explain why the Plaintiffs here titled their complaint a "petition for habeas corpus," and asked the district court to "[g]rant a writ of habeas corpus . . . that enjoins Defendants from removing them under the [Alien Enemies Act]."[59]

B. The District Of Columbia Is Not The Proper Location For This Suit Because Of The Habeas-Channeling Rule And Habeas' District-of-Confinement Rule.

At the district court's suggestion, the Plaintiffs voluntarily dismissed their habeas claims. That's because habeas claims must be brought where the petitioner is confined, and the Plaintiffs are not confined in the District of Columbia.

But merely dismissing the claims — even erasing the words 'habeas corpus' from the complaint — does not rescue the Plaintiffs' complaint. That's because of two important

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Ahrens, but *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), makes clear that *Ahrens*'s core holding remains good law. *See Padilla*, 542 U.S. at 443 ("for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement").

[58] *See, e.g.*, *Kaminer v. Clark*, 177 F.2d 51 (D.C. Cir. 1949); *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556 (S.D.N.Y.), *aff'd*, 158 F.2d 853 (2d Cir. 1946). *But cf. Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946) (claims not characterized as habeas, but habeas issue neither raised nor addressed).

[59] Complaint, ECF 1, at 1, 23 ¶ f (Prayer for Relief).

rules: the "habeas-channeling rule" and the "district of confinement rule."

First, the "habeas-channeling rule" requires core habeas claims, like the Plaintiffs' claims, to be brought *in habeas*.[60] Importantly, that means they must bring their claims in compliance with habeas's unique procedural requirements. As the Supreme Court has explained, if plaintiffs could resort to "the simple expedient of putting a different label on their pleadings" — framing their challenges as § 1983 claims, for instance — they could effectively "evade" these procedural requirements.[61] The habeas-channeling rule shuts the door to that kind of gamesmanship.[62]

The second relevant habeas rule is the "district of confinement rule."[63] That rule says that habeas claims must be

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[60] *See Nance v. Ward*, 142 S. Ct. 2214, 2222 (2022) ("this Court has held that an inmate *must proceed in habeas* when the relief he seeks would necessarily imply the invalidity of his conviction or sentence" (cleaned up) (emphasis added)); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) (plaintiffs can't "evade" habeas procedural requirements "by the simple expedient of putting a different label on their pleadings"); *Dufur v. United States Parole Commission*, 34 F.4th 1090, 1095 (D.C. Cir. 2022) ("[T]he sole remedy for assertedly unlawful incarceration is through habeas corpus.").

[61] *Preiser*, 411 U.S. at 489-90; *see Dafur*, 34 F.4th at 1095 (explaining that *Preiser*'s "habeas-channeling rule" prevents detained plaintiffs from "create[ing] a workaround to the habeas requirements").

[62] *Dafur*, 34 F.4th at 1095.

[63] *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004) ("for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement."); *cf. I.M.*, 67 F.4th at 444 ("Creating exceptions to jurisdictional rules is a job for Congress, not the courts.").

brought in the specific district where the plaintiff alleges that he is illegally confined.[64] It's "derived from the terms of the habeas statute," which specifies that "District courts are limited to granting habeas relief 'within their respective jurisdictions.'"[65] And it "serves the important purpose of preventing forum shopping by habeas petitioners," who could otherwise "name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction" — for example, in Washington, D.C.[66]

Though the extradition context is not perfectly analogous to the removal context, this court's decision in *LoBue v. Christopher* illustrates these principles.[67] The plaintiffs there wanted to stop the United States from extraditing them to Canada. They were held in the Northern District of Illinois, but they sued for declaratory relief and an injunction in the District of Columbia. We held that we lacked jurisdiction to consider their case because of "the availability . . . of habeas relief elsewhere."[68] We explained that the "availability of a habeas remedy in another district ousted us of jurisdiction over an

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[64] *Id.* Relatedly, "the proper respondent to a habeas petition is 'the person who has custody over the petitioner,'" *id.* at 434 (cleaned up) (quoting 28 U.S.C. § 2242) — the "immediate custodian rule," *id.* at 446. "Together," the district-of-confinement rule and the immediate-custodian rule "compose a simple rule that has been consistently applied in the lower courts . . . : Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement." *Id.* at 447.

[65] *Id.* (quoting 28 U.S.C. § 2241(a)).

[66] *Id.*

[67] 82 F.3d 1081 (D.C. Cir. 1996).

[68] *Id.* at 1082.

alien's effort to pose a constitutional attack on his pending deportation by means of a suit for declaratory judgment."[69]

There as here, the "plaintiffs' focus [was] not explicitly on their present custody."[70] There as here, the plaintiffs tried to avoid the habeas-channeling rule by "claim[ing] that the nature of the relief requested is different here" than in habeas suits "since they have not formally sought a release from custody as in the habeas action. But we have rejected precisely such efforts to manipulate the preclusive effect of habeas jurisdiction."[71]

* * *

To sum up, the Plaintiffs' claims sound in habeas because the Plaintiffs challenge the legal and factual bases for their imminent removal — a habeas claim. That claim must be brought in the district of confinement. The named Plaintiffs

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[69] *Id.*; *see also id.* at 1084 (addressing *Kaminer v. Clark*, 177 F.2d 51 (D.C. Cir. 1949), and explaining that though *Kaminer*'s precise holding had been overruled in 1955, "*Kaminer*'s logic controls for persons who, like the plaintiffs, have access to the habeas remedy").

[70] *Id.* at 1083; *see also Monk v. Secretary of Navy*, 793 F.2d 364, 366 (D.C. Cir. 1986) ("It is immaterial that Monk has not requested immediate release."); *cf. Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005) ("[W]e believe that a case challenging a sentence seeks a prisoner's 'release' in the only pertinent sense: It seeks invalidation (in whole *or in part*) of the judgment authorizing the prisoner's confinement; the fact that the State may seek a new judgment (through a new trial or a new sentencing proceeding) is beside the point . . . ." (emphasis added)).

[71] *LoBue*, 82 F.3d at 1083; *see also Monk*, 793 F.2d at 366 ("He may not avoid the requirement that he proceed by habeas corpus by adding a request for relief that may not be made in a petition for habeas corpus."); *see also Ahrens*, 335 U.S. 192-93.

here are all confined in Raymondville, Texas, which is in the federal Southern District of Texas. Therefore, that is where they must file.

III. The Government Satisfies The Remaining Stay Factors.

The Government has shown that it is irreparably harmed by the district court's orders. As explained above, a career State Department official has declared that the orders "harm[]" the "foreign policy of the United States" by jeopardizing the status of "intensive and delicate" negotiations with El Salvador and the Maduro regime in Venezuela. The orders risk the possibility that those foreign actors will change their minds about allowing the United States to remove Tren de Aragua members to their countries. Even if they don't change their minds, it gives them leverage to negotiate for better terms. "These harms could arise even in the short term."[72]

Reinforcing the State Department official's declaration is the irreparable harm that is all but inevitable when a court interferes with an ongoing national-security operation that is overseas or partially overseas. The Plaintiffs' counsel at oral argument could not identify an order of that kind, outside of the habeas context, that survived appellate review.[73] There are perhaps some that could be found, but they may be more cautionary tales than models to be emulated.[74]

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[72] Kozak Declaration ¶ 4.

[73] *Cf. Boumediene v. Bush*, 553 U.S. 723 (2008) (habeas context).

[74] *Cf. Schlesinger v. Holtzman*, 414 U.S. 1321, 1322 (1973) (staying order to halt the bombing of Cambodia); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550-51 (D.C. Cir. 1984) (Scalia, J., dissenting) ("In Old Testament days, when judges ruled the people

The Plaintiffs might respond that the same harm to foreign affairs and national security would follow from certification of a habeas class action in Texas. But the Government has not conceded that the Plaintiffs can certify a habeas class. All the Government has conceded is that individual habeas petitions can be brought in Texas. Whether the plaintiffs can certify a class and whether that class is entitled to relief is for a federal district court in Texas to decide.[75]

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of Israel and led them into battle, a court professing the belief that it could order a halt to a military operation in foreign lands might not have been a startling phenomenon. But in modern times, and in a country where such governmental functions have been committed to elected delegates of the people, such an assertion of jurisdiction is extraordinary. The court's decision today reflects a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing. The case before us could not conceivably warrant such unprecedented action."); *see also* Warren Weaver, Jr., *Douglas Upholds Halt In Bombing But Is Overruled*, N.Y. TIMES (Aug. 5, 1973).

[75] *Nken*, 556 U.S. at 434.

Whether Plaintiffs can seek habeas relief through a class action in the Southern District of Texas seems to be an open question for that court to resolve in the first instance. *See Jennings v. Rodriguez*, 583 U.S. 281, 324 (2018) (Thomas, J., concurring) ("This Court has never addressed whether habeas relief can be pursued in a class action."); *St. Jules v. Savage*, 512 F.2d 881 (5th Cir. 1975) (expressing no "view as to . . . the propriety of [a habeas] class action"); *Lynn v. Davis*, 2019 WL 570770 (S.D. Tex. 2019) ("*Even if* habeas claims may be pursued in a class action, ..." (emphasis added)). *But cf. Gross v. Quarterman*, No. CIV.A. H-04-136, 2007 WL 4411755, at *3 (S.D. Tex. Dec. 17, 2007) ("a class action . . . is not available in a habeas petition.") (dictum); *Cook v. Hanberry*, 592 F.2d 248 (5th Cir. 1979).

As for any irreparable harm to the Plaintiffs, they conceded at oral argument that they can seek all the relief in Texas that they have sought in the District of Columbia. So requiring them to sue in Texas does not impose on them irreparable harm.

Finally, as for the public interest, it favors the Government. As explained, sensitive matters of foreign affairs and national security are at stake.[76] And whatever public interest exists for the Plaintiffs to have their day in court, they can have that day in court where the rules of habeas require them to bring their suit — in Texas.

IV. Conclusion

Deportees are already petitioning for habeas corpus in Texas.[77] At least one petitioner has already secured a hearing date in the Southern District of Texas, plus a TRO preventing his removal in the interim.[78] According to the Government, that's exactly what Plaintiffs here should have done and still can.

The district court here in Washington, D.C. — 1,475 miles from the El Valle Detention Facility in Raymondville, Texas

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[76] *Cf. Kiyemba*, 561 F.3d at 519 (Kavanaugh, J., concurring).

[77] *See, e.g.*, Petition for Writ of Habeas Corpus, ECF 1, *Zacarias Matos v. Venegas et al.*, No. 1:25-CV-00057 (S.D. Tex. March 15, 2025); Petition for Writ of Habeas Corpus, ECF 1, *Gil Rojas v. Venegas et al.*, No. 1:25-CV-00056 (S.D. Tex. March 14, 2025).

[78] Minute Order, ECF 4, *Gil Rojas v. Venegas et al.*, No. 1:25-CV-00056 (S.D. Tex. March 14, 2025) ("IT IS ORDERED that Respondents shall NOT physically remove Petitioner Adrian Gil Rojas from the United States until the Court's resolution of the writ of habeas corpus . . . ."); *id.* (ordering the Government to respond by this Friday, March 28, 2025, and setting a hearing for April 9, 2025).

— is not the right court to hear the Plaintiffs' claims. The Government likely faces irreparable harm to ongoing, highly sensitive international diplomacy and national-security operations. The Plaintiffs, meanwhile, need only file for habeas in the proper court to seek appropriate relief.

The Government has met its burden to make "a strong showing that [it] is likely to succeed on the merits" and that it "will be irreparably injured absent a stay."[79] The issuance of the stay will" not "substantially injure the other parties interested in the proceeding."[80] And "the public interest lies" with a stay.[81] Therefore, I would grant its motion for a stay pending appeal.

I respectfully dissent.

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[79] *Nken*, 556 U.S. at 426.

[80] *Id.*

[81] *Id.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.G.G., *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Civil Action No. 25-766 (JEB)**

MEMORANDUM OPINION

In the predawn hours of Saturday, March 15, five Venezuelan noncitizens being held in Texas by the Department of Homeland Security sought emergency relief in this Court. They justifiably feared that, in a matter of hours, they might be removed from the country pursuant not to the Immigration and Nationality Act of 1952, but instead the Alien Enemies Act of 1798, a law last invoked in the wake of Pearl Harbor as the nation was preparing for a world war. That Act authorizes the President to summarily remove "natives, citizens, denizens, or subjects" of a "hostile nation or government" when there is "declared war" against it or when it has "perpetrated, attempted, or threatened against the territory of the United States" an "invasion or predatory incursion." 50 U.S.C. § 21. The President, Plaintiffs believed, had secretly signed a Proclamation invoking the Act, and, upon its imminent publication, the Government would begin immediately removing them without any hearing to ensure that they fell within its scope.

As expected, later that day the President indeed published a Proclamation announcing that because Tren de Aragua — a violent, transnational criminal organization based in Venezuela — had committed an "invasion" or "predatory incursion" upon the United States, the

Government could begin immediately deporting any Venezuelan noncitizens it deemed to be members of Tren de Aragua. See 90 Fed. Reg. 13033, 13034 (Mar. 14, 2025), § 1. Plaintiffs are among those so deemed.

But wait, they protest; the Government was mistaken. Each vehemently denies being a member of Tren de Aragua and thus subject to the Proclamation. Several in fact claim that they fled Venezuela to escape the predations of the group, and they fear grave consequences if deported solely because of the Government's unchallenged labeling. Plaintiffs therefore sought a Temporary Restraining Order preventing the Government from deporting them or other Venezuelan noncitizens under the Proclamation without a hearing.

To preserve the status quo until Plaintiffs' claims could be properly adjudicated, the Court issued two Temporary Restraining Orders that together prohibited the Government from relying solely on the Proclamation to remove the named Plaintiffs or any other Venezuelan noncitizens in its custody. Neither Order required the Government to release a single individual from its custody. Neither Order prevented the Government from apprehending anyone pursuant to the just-published Proclamation. And neither Order prevented the Government from deporting anyone — including Plaintiffs — through authorities other than the Proclamation, such as the INA. Indeed, as the President last month designated Tren de Aragua a Foreign Terrorist Organization, members of the gang are already inadmissible to (and thus deportable from) the United States under the INA. See 8 U.S.C. § 1182(a)(3)(B).

The Government now moves to vacate the TROs, primarily on the ground that there is not a sufficient likelihood that Plaintiffs will succeed on their legal claims. The President's unprecedented use of the Act outside of the typical wartime context — and Plaintiffs' various challenges to such use — implicates a host of complicated legal issues, including fundamental

and sensitive questions about the often-circumscribed extent of judicial power in matters of foreign policy and national security. Such concerns arise principally in connection with Plaintiffs' contention that any action taken pursuant to the Proclamation is unlawful because, despite the President's determination otherwise, Tren de Aragua is not a "foreign nation or government," and its actions, however heinous, do not amount to an "invasion" or a "predatory incursion."

The Court need not resolve the thorny question of whether the judiciary has the authority to assess this claim in the first place. That is because Plaintiffs are likely to succeed on another equally fundamental theory: before they may be deported, they are entitled to individualized hearings to determine whether the Act applies to them at all. As the Government itself concedes, the awesome power granted by the Act may be brought to bear only on those who are, in fact, "alien enemies." And the Supreme Court and this Circuit have long maintained that federal courts are equipped to adjudicate that question when individuals threatened with detention and removal challenge their designation as such. Because the named Plaintiffs dispute that they are members of Tren de Aragua, they may not be deported until a court has been able to decide the merits of their challenge. Nor may any members of the provisionally certified class be removed until they have been given the opportunity to challenge their designations as well. The Motion to Vacate will thus be denied.

I. Background

A. Statutory Background

It is uncontested that the Alien Enemies Act grants the President broad authority to take certain actions against individuals who are alien enemies. The relevant provision provides, in full:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

50 U.S.C. § 21.

Enacted in 1798, the Act is the only remaining component of "that ill-famed company known as the Alien and Sedition Acts." United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556, 563 (S.D.N.Y. 1946). Unlike the doomed Alien Friends, Naturalization, and Sedition Acts, however, the Alien Enemies Act never faced serious questions concerning whether it was a constitutional exercise of Congress's war powers. See Citizens Protective League v. Clark, 155 F.2d 290, 293 (D.C. Cir. 1946). As James Madison explained in 1800, "With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies." James Madison, Madison's Report on the Virginia Resolution, 4 Elliot's Debates 546, 554 (1800), https://perma.cc/U57E-L59L. Chief Justice Marshall, describing the Act, similarly emphasized that the President's authority *vis-à-vis* alien enemies stems from Congressional statute, noting that the law "confers on the president very great discretionary powers respecting [alien enemies]" and "affords a strong implication

that he did not possess those powers by virtue of the declaration of war." Brown v. United States, 12 U.S. (8 Cranch) 110, 126 (1814).

D.C. Circuit Judge E. Barrett Prettyman, whose name now adorns our city's federal courthouse, confirmed the validity of the Act in the wake of the Second World War when he declared, "The Alien Enemy Act is constitutional, both as an exercise of power conferred upon the Federal Government and as a grant of power by the Congress to the President." Clark, 155 F.2d at 293. Prior to that seismic conflict, the Act had been invoked only twice, during the War of 1812 and the First World War. During World War II, President Roosevelt used the Act, variously, to apprehend, intern, and remove Japanese, Germans, and Italians residing within the United States. See United States *ex rel.* Zdunic v. Uhl, 46 F. Supp. 688, 689 (S.D.N.Y. 1942); Masami Sasaki v. Rogers, 185 F. Supp. 191, 192 (D.D.C. 1960); Hohri v. United States, 586 F. Supp. 769, 774 (D.D.C. 1984). While vigorously deploying that power, Roosevelt nonetheless "provide[d] for hearings for arrested alien enemies . . . in order to permit them to present facts in their behalf." Schlueter, 67 F. Supp. at 565 (quotation marks omitted). Alien hearing boards, "composed of from three to six civilian members, served without compensation, heard the alien's evidence and made recommendations which were not binding on the Attorney General." Id.

Following the Second World War, the Alien Enemies Act lay dormant for 75 years.

B. Factual and Procedural Background

Until now. In early March, DHS began interrogating Venezuelan migrants in its custody, including Plaintiffs, about gang membership. See ECF No. 44-9 (Karyn Ann Shealy Decl.), ¶¶ 3–4; see also ECF No. 44-12 (Melissa Smyth Decl.), ¶ 11. Even after "vehemently den[ying] any affiliation with a gang, past or present," Plaintiffs say they were moved from detention centers across the country to the El Valle Detention Facility in south Texas. See Shealy Decl.,

¶¶ 4–5; ECF Nos. 44-6 (Austin Thierry Decl.), ¶¶ 5–6; 44-7 (Osvaldo E. Caro-Cruz Decl.), ¶¶ 8–10, 18; 44-8 (Katherine Kim Decl.), ¶ 5. The reason for this transport was unveiled on the night of Friday, March 14, when, in Plaintiffs' telling, they were among over 100 Venezuelan noncitizens who were pulled from their cells and told that they would be deported the next day to an unknown destination. See Shealy Decl., ¶ 7; Kim Decl., ¶ 19; Thierry Decl., ¶ 8.

Plaintiffs' counsel caught wind of these movements, and they came to believe that the President had signed or would imminently sign a Proclamation invoking the Alien Enemies Act. See ECF No. 1 (Compl.), ¶¶ 43–55. They suspected that the Proclamation would declare that Tren de Aragua had committed or attempted an "invasion" or "predatory incursion" such that any member of the group was summarily removable under the Act. See ECF No. 3-2 (TRO Br.) at 1–2, 4–5. Plaintiffs believed that the Proclamation could be published at any moment and, once it was, the Government would begin rapidly removing Venezuelan noncitizens — including Plaintiffs — whom it had determined to be members of Tren de Aragua. See id. at 2.

So, in the wee hours of Saturday morning, Plaintiffs filed this lawsuit and sought a Temporary Restraining Order preventing the Government from deporting them under the Act until their claims could be heard. See ECF No. 3-9 (Proposed TRO Order) at 1–2. In addition to contesting the lawfulness of the Proclamation, Plaintiffs staunchly deny that they are members of Tren de Aragua. See, e.g., Compl., ¶¶ 9–10, 12 (J.G.G., J.A.V., W.G.H.); ECF No. 3-6 (W.G.H. Decl.), ¶ 12; ECF No. 3-8 (J.A.V. Decl.), ¶ 5; Shealy Decl., ¶ 4; ECF No. 44-11 (Grace Carney Decl.), ¶ 3. They therefore feared being whisked away without a chance to challenge the Government's say-so.

From there, events developed rapidly. Shortly after being assigned this case around 8:00 a.m. on March 15, this Court contacted the Government and connected with defense counsel at

9:20 a.m. By then, the Court had been informed by Plaintiffs that at least one Plaintiff had apparently been put aboard an airplane along with other Venezuelans. See Shealy Decl., ¶ 8 (removal process began around 7:30 a.m.); ECF No. 44-10 (Stephanie Quintero Decl.), ¶ 3 (removal process began at 7:00 a.m.); Carney Decl., ¶¶ 11–12 (inmates were moved from El Valle at about 10:00 a.m.); Smyth Decl., ¶ 14. It thus appeared that, although the Government knew of the suit contesting the legality of removals under the Proclamation, it was nonetheless moving forward with its summary-deportation plans. In light of the "exigent circumstances," and because the Plaintiffs had "satisfied" the "factors governing the issuance of preliminary relief," the Court granted an initial TRO that morning. See Minute Order of Mar. 15, 9:40 a.m. That Order, which temporarily prohibited the Government from removing only the five named Plaintiffs, was "to maintain the status quo until a hearing" could take place with Plaintiffs and the Government. Id. The Order did not command the Government to release anyone from its custody. Id.

The Court then set an emergency hearing for 5:00 p.m. the same day to consider Plaintiffs' claim that relief should be broadened to a class of all noncitizens subject to the anticipated Proclamation. This gave both sides seven hours to investigate the facts and prepare their legal arguments. See ECF No. 4 (Mot. to Certify Class); Minute Order of Mar. 15, 11:04 a.m.

About an hour before that hearing began, the White House published the Proclamation on its website. See Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren De Aragua, White House (Mar. 15, 2025), https://perma.cc/D3GM-5YBM; ECF No. 28-1 (Robert L. Cerna Second Decl.), ¶ 5. As expected, it targeted Tren de Aragua. See 90 Fed. Reg. at 13033. The Proclamation announces that the gang has "infiltrated" the Maduro

government in Venezuela, "including its military and law enforcement apparatus." Id. It explains that "Venezuelan national and local authorities have ceded ever-greater control over their territories to transnational criminal organizations" like Tren de Aragua, resulting in "a hybrid criminal state." Id. It further states that Tren de Aragua "is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States," including by "undertaking hostile actions and conducting irregular warfare against the territory of the United States both directly and at the direction . . . of the Maduro regime." Id. at 13034, § 1. As a result, the Proclamation declares that "all Venezuelan citizens 14 years of age or older who are members of [Tren de Aragua], are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies" under the Act. Id.

In the 5:00 p.m. hearing, the Court began by clarifying the limited basis and scope of the TRO then in place, see ECF No. 20 (Mar. 15 Hearing Tr.) at 3, and then turned to whether it should provisionally certify a class — comprising Plaintiffs and those similarly situated — and issue a second TRO covering that class. See id. at 5–6. The Government began by objecting that the Court lacked venue because Plaintiffs' claims could be raised only through a petition for habeas corpus in the federal district in Texas where they were being held, not in the District of Columbia. See id. at 4–11.

Noting that it would benefit from further argument on the issue, the Court pivoted to addressing Plaintiffs' concerns "about imminent deportation." Id. at 11. It asked the Government whether there were any "removals under this Proclamation planned . . . in the next 24 or 48 hours." Id. Government counsel said that he did not know, but that he could report back. Id. Plaintiffs' counsel, however, interjected that several "sources" had informed him that

two flights "were scheduled for this afternoon that may have already taken off or [will] during this hearing." Id. at 12. So, at 5:22 p.m., the Court adjourned the hearing until 6:00 p.m. and directed the Government to find out whether removing people under the Proclamation was then in motion. Id. at 13–15.

When the hearing resumed shortly after 6:00 p.m., the Government surprisingly represented that it still had no flight details to share. See id. at 15–18. The Court thus returned to the venue issue. Noting that it was a "reasonably close question" if the habeas claims remained, the Court permitted Plaintiffs to dismiss them without prejudice, leaving only claims under the Administrative Procedure Act, for which venue in the District of Columbia was proper. See id. at 22; Compl., ¶¶ 79, 83, 86, 90, 92–95. The Court next provisionally certified a class of Plaintiffs covering all noncitizens in custody subject to removal under the Proclamation. See Mar. 15 Hearing Tr. at 23–26, 38.

That left the central question to be resolved: should the Court issue a broader TRO covering the entire class? At around 6:45 p.m., the Court answered the question in the affirmative. Whether Plaintiffs could show a likelihood of success on the merits, as required for a TRO, presented novel and nuanced legal issues — issues not easily deciphered in the abbreviated timeframe resulting from the Government's decision to hastily dispatch flights as legal proceedings were ongoing, a move that implied a desire to circumvent judicial review. The Court nonetheless concluded that Plaintiffs had shown that they had a substantial likelihood of prevailing, and that they would suffer irreparable injury if Act-based removals were not temporarily halted. See id. at 41–42. The Court therefore ordered that for 14 days the Government was enjoined from removing any noncitizens in its custody solely on the basis of the Proclamation. See id. at 42. The Court then told Government counsel: "[Y]ou shall inform

your clients of [the Order] immediately, and that any plane containing [members of the class] that is going to take off or is in the air needs to be returned to the United States . . . . However that's accomplished, whether turning around a plane or not [dis]embarking anyone on the plane . . . , I leave to you. But this is something that you need to make sure is complied with immediately." Id. at 42. Not long after, the Court memorialized the Order on the docket, referencing the just-held hearing. See id. at 47; Minute Order of Mar. 15, 7:25 p.m.

It is important to stress once again that the Order was narrow: it prevented Defendants only from removing the Plaintiff class on the sole basis of the Proclamation. In other words, the Order did not prevent Defendants from removing anyone — to include members of the class — through other immigration authorities such as the INA. Indeed, as previously mentioned, those affiliated with Tren de Aragua were all already deportable under that statute as members of an FTO. See 8 U.S.C. 1182(a)(3)(B). The Order also did not require Defendants to release a single person held in their custody, even individuals held only on the basis of the Proclamation. And it did not even prevent Defendants from apprehending noncitizens under the authority of the Proclamation (or any other law, for that matter).

It soon emerged that two planes were indeed likely in the air during the hearing. In other words, the Government knew as of 10:00 a.m. on March 15 that the Court would hold a hearing later that day, and the most reasonable inference is that it hustled people onto those planes in the hopes of evading an injunction or perhaps preventing them from requesting the habeas hearing to which the Government now acknowledges they are entitled. See *infra* p. 13. According to the Government, prior to this Court's oral ruling at around 6:45 p.m., two planes had departed the United States carrying persons designated as Tren de Aragua members and deported based solely on the Proclamation. See ECF No. 49 (Cerna Third Decl.), ¶ 5. A third plane that left some

hours later did not, at least according to the Government, contain persons removed solely pursuant to the Proclamation. See ECF No. 26-1 (Cerna First Decl.), ¶ 6. Upon landing in El Salvador, members of the Plaintiff class were apparently transferred into one of that country's detention facilities, known as the Center for Terrorism Confinement (CECOT). See Secretary Marco Rubio (@SecRubio), X (Mar. 16, 2025, 8:39 a.m.), https://x.com/SecRubio/status/1901252043517432213 (sharing video of the transfer). As will be discussed, conditions in CECOT are reportedly parlous. See *infra* Section III.C.

Plaintiffs emphatically protest that many of the people on the first two flights are not members of Tren de Aragua. They include in their filings the declarations of lawyers who state that their clients who were removed to El Salvador on those flights have no connection to the gang. See generally ECF No. 44-5 (Linette Tobin Decl.); Thierry Decl.; Caro-Cruz Decl.; Kim Decl.; see also ECF No. 44 (Opp.) at 7–8. The Government rejoins that Immigration and Customs Enforcement "personnel carefully vetted each individual alien to ensure they were in fact members of [Tren de Aragua]," although it concedes that not all of them "have criminal records in the United States." Cerna First Decl., ¶¶ 7, 9.

Because the Court had to act on such an expedited basis, it wished to afford the Government an opportunity to brief the issues involved, and it thus permitted Defendants to move to vacate the TROs, which they have now done. See ECF No. 26 (Mot. to Vacate). Plaintiffs responded, and the Court held oral argument on March 21. See ECF No. 51 (Mar. 21 Hearing Tr.). The Government also appealed to the D.C. Circuit, seeking a stay of the TROs, see Corrected Emergency Motion for a Stay Pending Appeal, J.G.G. v. Trump, No. 25-5067 (D.C. Cir. Mar. 16, 2025), and also asked the Court of Appeals to reassign this case to a different district judge. See Letter Pursuant to Rule 28(j) at 2, J.G.G. v. Trump (D.C. Cir. Mar. 17, 2025).

As the Circuit panel is set to hear the case shortly, the Court wishes to set forth its reasoning more fully after briefing and argument. See Order, J.G.G. v. Trump (D.C. Cir. Mar. 19, 2025).

II. Legal Standard

Like preliminary injunctions, TROs "do not conclusively resolve legal disputes." Lackey v. Stinnie, 145 S. Ct. 659, 667 (2025). Rather, their purpose is "merely to preserve the relative positions of the parties until a trial on the merits can be held and to balance the equities as the litigation moves forward." Id. (citations and quotation marks omitted). Granting such preliminary relief is thus "an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 579 (2017).

Motions for TROs and preliminary injunctions are governed by the same standards. Gomez v. Trump, 485 F. Supp. 3d 145, 168 (D.D.C. 2020). "A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011) (alterations in original) (quoting Winter, 555 U.S. at 20). "The moving party bears the burden of persuasion and must demonstrate, 'by a clear showing,' that the requested relief is warranted." Hospitality Staffing Solutions, LLC v. Reyes, 736 F. Supp. 2d 192, 197 (D.D.C. 2010) (quoting Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006)).

III. Analysis

The Court starts by addressing whether it has jurisdiction to hear Plaintiffs' APA claims. Finding that it does, it then addresses the four aforementioned TRO factors, devoting the lion's share of the analysis to the likelihood of success on the merits.

A. Jurisdiction

Defendants initially contend that, because a noncitizen can contest the applicability of a Proclamation under the Alien Enemies Act through a petition for a writ of habeas corpus, he can do so only through such an action. See Mot. to Vacate at 8–11. According to the Government, Plaintiffs consequently should have brought this challenge via habeas claims in the district of their detention, and this Court has no jurisdiction over their APA claims. Id. at 9.

To be sure, judicial review of Alien Enemies Act claims has generally taken place in the context of a petition for a writ of habeas corpus. See, e.g., Ludecke v. Watkins, 335 U.S. 160, 163 (1948); United States *ex rel.* D'Esquiva v. Uhl, 137 F.2d 903, 904 (2d Cir. 1943); United States *ex rel.* Kessler v. Watkins, 163 F.2d 140, 140 (2d Cir. 1947); Bauer v. Watkins, 171 F.2d 494, 493 (2d Cir. 1948). But that fact is largely a relic of historical happenstance. In past invocations of the Act, those subject to removal were also detained solely on that basis. See, e.g., D'Esquiva, 137 F.2d at 904 ("By habeas corpus the relator sought release from detention by the respondent, who holds him in custody as an alien enemy under an order of the Attorney General purporting to act pursuant to the Alien Enemy Act and the presidential proclamation of December 8, 1941.") (citations omitted). Habeas was consequently the appropriate avenue for individuals to challenge the Government's application of the Act.

Prior to the 1952 passage of the INA, in fact, "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district

court." INS v. St. Cyr, 533 U.S. 289, 306 (2001) (emphasis added). Pre-INA plaintiffs therefore naturally brought challenges under the Alien Enemies Act through habeas actions. Even so, plaintiffs have previously brought civil actions challenging their detention and removal under the Act on non-INA grounds on at least three occasions, and those actions were duly heard and decided by courts. In Clark, for instance, our Circuit considered a consolidated appeal of "three civil actions brought . . . for injunction, mandatory injunction and ancillary relief . . . upon the ground that the Alien Enemy Act is repugnant to the Constitution." 155 F.2d at 291–92 (noting that one group of plaintiffs comprised "individuals who are German nationals and who allege that they are threatened with deportation as alien enemies"). The district court "dismissed the complaints on the merits," id. at 292, and the court of appeals affirmed. Id. at 293. Defendants are wrong to suggest, then, that habeas has historically been the exclusive remedy for individuals contesting the application of the Act.

The Government nevertheless insists that the existence of habeas jurisdiction "preclu[des]" jurisdiction over any other claims, including those brought under the APA. See Mot. to Vacate at 9. The APA, however, has long been available to plaintiffs absent specific preclusion by Congress. See Robbins v. Regan, 780 F.2d 37, 42 (D.C. Cir. 1985) ("[J]urisdiction over APA challenges to federal agency action is vested in district courts unless a preclusion of review statute . . . specifically bars judicial review in the district court."); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1038 (D.C. Cir. 2002) ("clear and convincing evidence" of congressional intent is needed to "preclude judicial review" under APA) (quoting Abbott Lab'ys. v. Gardner, 387 U.S. 136, 141 (1967)).

The Supreme Court has made clear that the same principle applies even in immigration challenges where habeas is also available. In Brownell v. We Shung, 352 U.S. 180 (1956), a

noncitizen who was "ordered deported" challenged "the legality of an exclusion order" through "an action for declaratory judgment under . . . the Administrative Procedure Act." Id. at 181. The Supreme Court, asked to decide whether such a challenge must be "by habeas corpus," concluded that "either remedy is available in seeking review of such orders." Id.; accord Shaughnessy v. Pedreiro, 349 U.S. 48, 49–52 (1955). As this Court has explained, "[A]lthough Congress has expressly limited APA review over individual deportation and exclusion orders, it has never manifested an intent to require those challenging an unlawful, nationwide detention policy to seek relief through habeas rather than the APA." R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 186 (D.D.C. 2015) (citation omitted). In other words, "APA and habeas review may coexist." Id. at 185.

Because Plaintiffs are "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," they are "entitled to judicial review" under the APA. See 5 U.S.C. § 702. And because the Government's orders of removal are "the consummation of the agency's decisionmaking process" and are actions "by which rights or obligations have been determined, or from which legal consequences will flow," Bennett v. Spear, 520 U.S. 154, 178 (1997) (quotation marks omitted), they are "final agency action[s] that are "subject to judicial review." 5 U.S.C. § 704; cf. Nasrallah v. Barr, 590 U.S. 573, 584 (2020) ("A final order of deportation is now defined as a final order concluding that the alien is deportable or ordering deportation.") (quotation marks omitted).

The availability of APA review notwithstanding, Defendants insist that Plaintiffs' contrary-to-law and arbitrary-and-capricious claims are merely "restyl[ed]" habeas claims. See Mot. to Vacate at 10. The Government contends that, "at the end of the day, [Plaintiffs] are challenging and asserting that the Government is entirely without authority under the [Alien

Enemies Act] to exercise custody over their persons." Mar. 21 Hearing Tr. at 18. In characterizing Plaintiffs' arguments as "core habeas claim[s]," id., however, Defendants ignore the unusual circumstances that gave rise to this suit. Plaintiffs represent a class of noncitizens who are both subject to the Proclamation and in Government custody pursuant to authorities independent from the Act. In other words, Plaintiffs had already been detained when the Proclamation was applied to them. They bring this action "seek[ing] this Court's intervention to temporarily restrain [the Government's] summary removals." Compl., ¶ 4; see also id. at 21 (requesting order "to stay [the Government's] removals under the Proclamation").

Plaintiffs' challenge is accordingly centered on the legality of their removal under the Alien Enemies Act. Nowhere in their Complaint do they suggest that they are being unlawfully detained. Nor are they contesting the validity of their confinement or seeking to shorten its duration. Indeed, Plaintiffs have repeatedly emphasized throughout this litigation that they "do not seek release from custody." Opp. at 20; see also Mar. 15 Hearing Tr. at 19.

The Government, then, is only loosely correct in arguing that Plaintiffs challenge its authority to exercise custody over their persons. The relevant detail for our purposes is instead that Plaintiffs attack the Government's authority to deport (as opposed to detain) their persons. That is because "[h]abeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." Munaf v. Geren, 553 U.S. 674, 693 (2008) (emphasis added); accord Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) (purpose of habeas relief is "to provide the means for a . . . prisoner to attack the validity of his confinement."); Heck v. Humphrey, 512 U.S. 477, 481 ("[H]abeas corpus is the exclusive remedy for a . . . prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release."). The upshot of that axiom is that a plaintiff seeking relief that

"would not necessarily spell immediate or speedier release" brings a claim falling outside of "core habeas corpus relief." Wilkinson v. Dotson, 544 U.S. 74, 81 (2005) (emphasis and quotation marks omitted).

Indeed, the Supreme Court has never "recognized habeas as the sole remedy, or even an available one, where the relief sought would neither terminate custody, accelerate the future date of release from custody, nor reduce the level of custody." Skinner v. Switzer, 562 U.S. 521, 534 (2011) (cleaned up). On the contrary, it has made clear that when detained persons do not seek "simple release" and instead "request an injunction prohibiting the United States from transferring them to [foreign] custody," they "do not state grounds upon which habeas relief may be granted." Munaf, 553 U.S. at 692–93. Accordingly, "a federal prisoner need bring his claim in habeas only if success on the merits will 'necessarily imply the invalidity of confinement or shorten its duration.' Otherwise, he may bring his claim through a variety of causes of action." Davis v. U.S. Sent'g Comm'n, 716 F.3d 660, 666 (D.C. Cir. 2013) (quoting Wilkinson, 544 U.S. at 82).

Because the Government disregards that key distinction between challenging one's confinement and one's removal, none of the cases it cites is persuasive. Defendants point to several opinions in which our Circuit set out the principle that plaintiffs cannot mask habeas claims as actions for declaratory judgment in an effort "to give jurisdiction to a district other than that in which the applicant is confined or restrained." Kaminer v. Clark, 177 F.2d 51, 52 (D.C. Cir. 1949); see Mot. to Vacate at 10 (citing Clark v. Memolo, 174 F.2d 978, 981 (D.C. Cir. 1949), and Monk v. Sec'y of Navy, 793 F.2d 364, 366 (D.C. Cir. 1986)). That principle, however, carries little weight when — as here — the plaintiff does not actually seek to challenge his

"detention," Kaminer, 177 F.2d at 52, or "the validity of his confinement." Clark, 174 F.2d at 982.

For similar reasons, LoBue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996), is inapposite. In that case, the plaintiffs sought to challenge the constitutionality of an extradition statute under which they had been detained. Id. at 1081–82. The court rejected their attempt to distinguish their action from a habeas action, explaining that the relief in both suits would be the same: "a release from custody." Id. at 1083. Here, however, Plaintiffs do not endeavor to "manipulate the preclusive effect of habeas jurisdiction." Id. Unlike the LoBue challengers, they seek different relief in this suit — *i.e.*, relief from removal — from what they would in a habeas action objecting to their confinement. The LoBue court, moreover, expressly distinguished its extradition holding from precedent permitting "an alien subject to a deportation order to seek relief by way of a declaratory judgment action." Id. (emphasis added). And it did so on the ground that, unlike in the deportation context, "extension of the APA to extradition orders is impossible." Id. If anything, then, the cases cited by the Government confirm the Court's conclusion that this challenge — unlike previous suits — does not pose jurisdictional issues.

Because Plaintiffs do not seek release from confinement — and such release would not be the inevitable result if they succeed on the merits of their claims — they are not limited to habeas relief. Instead, they may challenge the Government's application of the Proclamation to them as arbitrary and capricious and contrary to law under the APA. See Compl., ¶¶ 79, 83, 86, 90, 92–95. There is accordingly no need to address the independent availability of their other claims for relief, such as their *ultra vires* claims against the facial validity of the Proclamation, see id., ¶¶ 70–73, 96–99 — although there is reason to believe that such claims can be brought. See Chamber of Com. of U.S. v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

B. Likelihood of Success on Merits

Plaintiffs raise three principal legal challenges. First, they argue that any action taken pursuant to the Proclamation is unlawful because the Proclamation itself lacks a legal basis. That is so, they contend, because the actions of Tren de Aragua constitute neither an "invasion" nor a "predatory incursion," and the group, moreover, is not a "foreign nation or government." Second, Plaintiffs protest that even if the Act has been lawfully invoked here, they fall outside the scope of the Proclamation because they are not members of Tren de Aragua, and they must be given an opportunity to contest the Government's assertion that they are. Third, Plaintiffs assert that even if they are removable under the Act, they cannot be deported to a place like El Salvador where torture likely awaits. While the Court takes up these questions in order, at this stage, the second position is Plaintiffs' strongest.

1. *Lawfulness of Proclamation*

Plaintiffs understandably focus their initial fire on the applicability of the Act itself. The Proclamation cannot invoke the Act, they argue, because Tren de Aragua is not the British in the War of 1812 nor the German state in the two World Wars; it is not a "nation or government" and has not committed an "invasion" or a "predatory incursion." See TRO Br. at 9–12; Opp. at 24–31. Although it contends otherwise, the Government more fundamentally asserts that the Court has no business intruding into these nonjusticiable political questions. See Mot. to Vacate at 11–13. Given the broad powers the Executive possesses in national security and foreign affairs, this issue is a close call, and one the Court need not resolve today.

The political-question doctrine "arises from the constitutional principle of separation of powers." Al-Tamimi v. Adelson, 916 F.3d 1, 8 (D.C. Cir. 2019). It "excludes from judicial review those controversies which revolve around policy choices and value determinations

constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986). Put differently, it prevents courts from resolving "matters not legal in nature," id. (quotation marks omitted), or deciding an issue that "turn[s] on standards that defy judicial application." Baker v. Carr, 369 U.S. 186, 211 (1962).

Simply because a legal claim implicates foreign affairs or national security, however, does not mean that the political-question doctrine places it "beyond judicial cognizance." Id.; see Al-Tamimi, 916 F.3d at 10–11; El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 841–43 (D.C. Cir. 2010). Indeed, the Supreme Court has cautioned that a court should not unnecessarily flinch from a justiciable controversy that it has "a responsibility to decide" simply because the claim arises in the foreign-affairs context. Zivotofsky *ex rel.* Zivotofsky v. Clinton (Zivotofsky I), 566 U.S. 189, 194–201 (2012). To the degree that a claim requires the court to interpret a statutory provision or decide a law's constitutionality, the political-question doctrine is not implicated: deciding such questions "is a familiar judicial exercise." Id. at 196. But insofar as the claim would ultimately require the court to "supplant a foreign policy decision of [a] political branch[] with [its] own unmoored determination of what" the "policy . . . should be," id., or to "reconsider[] the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security," El-Shifa, 607 F.3d at 842, the claim is not justiciable. Id. In such cases, the political-question doctrine typically comes into play either because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or because there are no "judicially discoverable and manageable standards for resolving it." Baker, 369 U.S. at 217. Both of those reasons, the Government contends,

preclude review of Plaintiffs' challenge to the Proclamation's underlying legality. See Mot. to Vacate at 12–13.

On this issue, the Court is not drawing on a blank slate. The Supreme Court's decision in Ludecke provides the crucial jumping-off point for determining which, if any, predicates to the Alien Enemy Act's use are justiciable. That case arose because the United States sought to remove a German national under the Act in 1946 — that is, after the "shooting war" with Germany had ended but before the political branches had formally declared peace with the Nazis' successors. See Ludecke, 335 U.S. at 162–63, 166. The German national objected that the President's statutory authority dissolved upon the end of actual hostilities. Id. at 166–67. The Court disagreed, holding that the Act's grant of authority remained available to the President until war with Germany was terminated by "treaty," "legislation," or "Presidential proclamation." Id. at 168. And the Court found no evidence of any such "political act." Id. at 169–70. In fact, it pointed to a recent presidential proclamation indicating that the Executive Branch thought that the war remained ongoing. See id. at 170.

The Ludecke Court, however, did not say that deciding whether a war had ended was a political question that the judiciary was unempowered to resolve. Instead, it interpreted "declared war," defined its termination based on that construction, and decided as a factual matter whether such termination had occurred. See also United States *ex rel.* Jaegeler v. Carusi, 342 U.S. 347, 348 (1952) (holding that "joint resolution of Congress . . . terminated the state of war" with Germany and thereby extinguished Executive's "statutory power" to remove aliens under Act). None of those issues presented a political question. Instead, the Court disclaimed a judicial role only in considering whether there even was a German government "capable of negotiating a treaty of peace" and whether removals of enemy aliens was worthwhile "when the

guns are silent but the peace of Peace has not come." Ludecke, 335 U.S. at 170. Those were "matters of political judgment for which judges have neither technical competence nor official responsibility." Id.

In light of Ludecke and the political-question doctrine's principles thus far explained, this Court is confident that it can — and therefore must, at the appropriate time — construe the terms "nation," "government," "invasion," and "predatory incursion." Cf. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024). While doing so may be no light undertaking, it is a judicial one. A harder question is whether, based on those definitions, this or any court would be empowered to decide if the characteristics of Tren de Aragua qualify it as a "nation" or "government," or if its conduct constitutes a "perpetrated, attempted, or threatened" "invasion" or "predatory incursion." 50 U.S.C. § 21. There may be judicially discoverable and manageable criteria that would allow a court to do so. In such a scenario, the Executive's view would not be dispositive, but it would be important: its "evaluation of the facts" and "informed judgment" would be afforded significant "respect." See Holder v. Humanitarian L. Project, 561 U.S. 1, 33–34 (2010).

Such a framework is not inconceivable or even unprecedented. The plurality opinion in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), suggests that in order to determine whether a Congressional grant of authority is available to the Executive Branch, courts can assess the record to decide whether something as dynamic and murky as "active combat" is then occurring. See id. at 521; but see id. at 588 (Thomas, J., dissenting) (objecting that courts are "bound by the political branches' determination that the United States is at war" and citing Ludecke as support). The plurality concluded as much even though (or perhaps because) the conflict that served as the predicate for the Executive's detention authority was "unconventional [in] nature" and rested on

"malleable" national-security "underpinnings." See id. at 520 (plurality opinion) (quotation marks omitted) (noting War on Terror "unlikely to end with a formal cease-fire" and Executive Branch might "not consider [the] war won for two generations") (quotation marks omitted). Nor, in the plurality's view, was deciding whether "active hostilities" persisted constitutionally committed to the Executive in that context. Id. at 520–21; but see id. at 516–17 (not reaching whether Article II alone provides Executive detention authority at issue). In other contexts, moreover, courts regularly decide whether certain conduct qualifies as militaristic or warlike. See, e.g., Kaplan v. C. Bank of the Islamic Republic of Iran, 896 F.3d 501, 512, 514 (D.C. Cir. 2018); Pan Am. World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1012–13, 1015–17 (2d Cir. 1974).

In any event, these complicated issues bearing on fundamental questions of Judicial, Congressional, and Executive power need not be settled at this early posture. As the Court will next explain, Plaintiffs have established a likelihood of succeeding on a more discrete claim that justifies retaining the TROs even assuming *arguendo* that the Proclamation has a legal basis.

2. *Application of Proclamation to Plaintiff Class*

The thorny issues of justiciability just described do not attend the entirely separate determination that an individual detained or removed under the Proclamation is, in fact, an "alien enemy," 50 U.S.C. § 21, as defined by the President's Proclamation — *i.e.*, a Venezuelan citizen 14 years of age or older who is a member of Tren de Aragua and not a naturalized or lawful permanent resident of the United States. See 90 Fed. Reg. at 13034, § 1. As the Government essentially concedes, see Mot. to Vacate at 8; Mar. 21 Hearing Tr. at 13–15, an unbroken line of precedent establishes that federal courts may review under habeas the factual basis for an "alien enemy" determination when it is challenged. Here, even assuming that the Proclamation itself is

lawful, all five named Plaintiffs challenge their designation as members of Tren de Aragua. See Opp. at 7. The Court holds that they may do so under the APA, and that they may not be removed from the United States until those challenges have been adjudicated. It further holds that all class members must be given the opportunity to challenge their classifications as alien enemies, if they wish to do so, before they may be lawfully removed from the United States pursuant to the Proclamation.

In concluding as much, the Court breaks no new ground. First, it is a familiar exercise for courts to review under the APA whether a person falls within the scope of an executive order without addressing the underlying lawfulness of the order, including in the context of foreign affairs and national security. See, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 159, 162 (D.C. Cir. 2003) (describing review of Treasury Department designations under the International Emergency Economic Powers Act). Such a circumscribed contest addresses Executive Branch officials' factual determination that a plaintiff falls within the parameters of the executive order; it does not in any way question the President's authority to issue the order in the first instance.

Second, review of alien-enemy status has long been routine under the Alien Enemies Act. Indeed, Ludecke expressed no reticence over the role of courts in adjudicating "whether the person restrained is in fact an alien enemy fourteen years of age or older." 335 U.S. at 171 n.17. Indeed, the Court readily admitted that such determinations "may . . . be reviewed." Id. In Clark, our Circuit likewise acknowledged that "whether the individual involved is or is not an alien enemy . . . [is] open to judicial determination." 155 F.2d at 294. To be sure, neither case squarely presented that question, see Ludecke, 335 U.S. at 171 n.17; Clark, 155 F.2d at 294, making those pronouncements *dicta*. See In re Grand Jury Investigation, 916 F.3d 1047, 1053

(D.C. Cir. 2019). But that is of little help to Defendants. *Dicta* from the Supreme Court "generally must be treated as authoritative," United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997) (quotation marks omitted), and the Government has not contested that courts may review Plaintiffs' challenges to their factual designations as members of Tren de Aragua. See Mot. to Vacate at 8.

The Court in Ludecke, moreover, was drawing on a rich tradition of such review in the lower courts. Faced with repeated claims from detained individuals challenging their designation as alien enemies, courts time and again examined the factual basis for the designation and, where necessary, ordered release if the facts did not show that the detainee was an alien enemy. That body of caselaw serves as exceedingly persuasive authority for exercising such review power here.

Take, for example, *Ex parte* Gilroy, 257 F. 110 (S.D.N.Y. 1919) — a case on which Defendants themselves rely. See Mot. to Vacate at 7. There, a certain Walter Alexander filed a petition for a writ of habeas corpus to contest the determination that he was detainable as a "German alien enemy." See Gilroy, 257 F. at 110–11. The Government argued that the court was without jurisdiction to review its factual finding because, "even though it can be shown beyond question that an error has been made, . . . the decision of the executive is final." Id. at 112. The court, in one of the earliest discussions of this issue on record, rejected that assertion. While acknowledging that it was "[v]ital" in "time of war not to hamper acts of the executive in the defense of the nation and in the prosecution of the war," the court thought it "of equal and perhaps greater importance" to "preserv[e] . . . constitutional rights." Id. at 114. It thus held a hearing on Alexander's challenge at which "each side was permitted to adduce testimony with a good deal of liberality," id., and it proceeded to undertake an involved examination of the facts

— evaluating the credibility of witnesses, the reliability of evidence, and the probative value of the testimony offered. See id. at 114–24. At the end of this thorough inquiry, the court overturned the Government's factual finding, declaring that Alexander was in fact a U.S. citizen. Id. at 128.

Subsequent cases during the Second World War largely followed that approach. In Zdunic, the court addressed whether a detainee fell "within the class of aliens whose restraint is authorized under the statute and presidential proclamation pursuant to which he is held in custody." 137 F.2d at 860. As it noted, the "ultimate issue" presented was whether he was a "'native, citizen, denizen, or subject' of Germany." Id. (quoting 50 U.S.C. § 21). "The meaning of those words as used in the statute," the court held, was a "question of law." Id. Likewise, whether the individual detained fell within "the statutory definition of alien enemies" correspondingly involved "questions of fact" as to which he was also "entitled to a judicial inquiry." Id. at 860–61. Because the lower court had held that there was "no substantial issue of fact" to warrant a hearing or to release the detainee, the appellate tribunal reversed. Id. at 860. United States *ex rel.* Schwarzkopf v. Uhl, 137 F.2d 898 (2d Cir. 1943), affirmed an essentially identical approach. The court there held that a detainee who "allege[d] that he [was] neither a citizen nor subject of Germany" and who raised "issues of fact" was "entitled to . . . a hearing of testimony before the court." Id. at 900. It noted that the "only ground" that could justify detention under the Act was one's alien-enemy status — and not because one was "dangerous to public safety" or even simply an "alien." Id. at 903. Because, on "conceded facts," the detainee was "not a German citizen," he was ordered "discharged from custody." Id.

The Court could go on. Other cases just within the Second Circuit sing from the same songbook. See, e.g., D'Esquiva, 137 F.2d at 904, 907 (reversing denial of writ to Austrian Jew

who contested that he was "native" of Germany simply because it had annexed Austria); Bauer, 171 F.2d at 494 (holding "record as it now stands" did not show conclusively that detainee was German native or citizen). Courts throughout the country — from Georgia, see Banning v. Penrose, 255 F. 159, 160 (N.D. Ga. 1919), to Illinois, see United States *ex rel.* Hack v. Clark, 159 F.2d 552, 554 (7th Cir. 1947); Minotto v. Bradley, 252 F. 600, 602 (N.D. Ill. 1918), to Mississippi, see *Ex parte* Fronklin, 253 F. 984, 984 (N.D. Miss. 1918) — charted the same course. To be sure, the fact that a detained person might in fact be a U.S. citizen was front and center for some courts. See, e.g., Banning, 255 F. at 160; Gilroy, 257 F. at 119–24. But others applied equally rigorous review when detainees claimed only that they were not citizens or natives of an enemy nation. See, e.g., Zdunic, 137 F.2d at 859–60 (Yugoslavia); D'Esquiva, 137 F.2d at 903 (Austria); see also Schwarzkopf, 137 F.2d at 903 ("aliens owing allegiance to some friendly nation" outside purview of Act). These cases establish conclusively that courts can determine an individual's alien-enemy status — and are obligated to do so when asked.

The Government's only answer to this substantial body of caselaw is to rest on its assertion that such judicial inquiry can take place only in a habeas court. See Mot. to Vacate at 8–11. As previously explained, that is incorrect. See *supra* Section III.A. For reasons both historical and circumstantial, habeas was indeed the traditional route to test the legality of the Act's application to alleged alien enemies. Where, as here, individuals do not seek release from confinement, a cause of action under the APA is appropriate (and indeed, may be the only way) to determine whether Executive Branch officials have operated in accordance with law. The availability of judicial review — under either habeas or the APA — to evaluate whether an alien falls within the terms of the Act is therefore well established.

It is admittedly less clear, however, where lie the precise contours of that review. When presented with such questions, habeas courts have appeared to sanction a searching inquiry, including convening hearings in which evidence could be introduced and testimony heard. See, e.g., Gilroy, 257 F. at 114–24; Schwarzkopf, 137 F.2d at 900; Zdunic, 137 F.2d at 860; Bauer, 171 F.2d at 493–94. But they have split on whether the Government would bear the burden of proof in such proceedings. Compare, e.g., Gilroy, 257 F. at 114 (burden is plaintiff's), and *Ex parte* Risse, 257 F. 102, 103 (S.D.N.Y. 1919) (same), with Bauer, 171 F.2d at 493 (burden is Government's). Plaintiffs' decision to bring their claims under the APA rather than habeas also raises the question of whether the standard of review is the same under each avenue of relief. The APA, for instance, subjects agency factfinding to the lenient "substantial evidence" standard of review, but only where a court evaluates the "record of an agency hearing." 5 U.S.C. § 706(2)(E); see Reiner v. United States, 686 F.2d 1017, 1022 n.4 (D.C. Cir. 1982) ("The substantial evidence test applies to agency adjudication only after a trial-type hearing required by statute to be on the record."). To date, there is no indication that the Government has provided, or intends to provide, hearings to determine whether those subject to the Proclamation are indeed members of Tren de Aragua. See Mar. 21 Hearing Tr. at 51. That leaves the Court nothing to evaluate except the affidavits that have been filed. See, e.g., Cerna First Decl.

Even were agency adjudication to be provided, hard questions would nonetheless remain concerning what deference, if any, the agency's factual determinations should receive from the reviewing court — especially when those determinations themselves would decide the lawful scope of the agency's authority and may implicate constitutional rights. See Crowell v. Benson, 285 U.S. 22, 58–61 (1932); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982) (plurality opinion). The answer to such questions may depend on the nature of the

challenge articulated (*e.g.*, whether the alien asserts that he is an American citizen, a lawful permanent resident, or not a member of Tren de Aragua), as well as the character of the administrative procedures in place. Cf. Hamdi, 542 U.S. at 533 (plurality opinion) ("[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."); Boumediene v. Bush, 553 U.S. 723, 771, 781 (2008) (holding that aliens designated enemy combatants and detained by United States may challenge their designation, but "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings"); Al-Adahi v. Obama, 613 F.3d 1102, 1103–05 (D.C. Cir. 2010) (discussing whether preponderance-of-evidence standard is necessary in reviewing factual determinations made by Executive tribunals adjudicating whether detainees were members of Taliban).

The Court need not resolve such quandaries today, even though they loom on the horizon. Indeed, when asked at argument on the Motion to delineate what procedures would be appropriate, neither side offered a clear protocol. See Mar. 21 Hearing Tr. at 19–22, 35–38. At this juncture, however, that does not hamstring Plaintiffs' effort to obtain a TRO. The named Plaintiffs, on behalf of themselves and their class, contest their designations as members of Tren de Aragua and argue that they must be given an opportunity to challenge Defendants' position that they fall within the Proclamation. See Opp. at 7–8, 13. Because the caselaw is clear that such questions are reviewable, and because those outside the bounds of the Proclamation's definition of "alien enemies" are not removable under the Act, Plaintiffs are likely to succeed on the merits of their claim.

The Alien Enemies Act itself, moreover, arguably envisions that those caught up in its web must be given the opportunity to seek such review. That is because the Act places limits on when the President may "provide for the removal of" alien enemies: he may do so only when those so identified "refuse or neglect to depart" from the United States. See 50 U.S.C. § 21. Notably, no such qualification is placed on the President's authority to detain alien enemies. See id. (authorizing the President to "direct . . . the manner and degree of the restraint to which [alien enemies] shall be subject and in what cases"). By its plain terms, then, the Act withholds from the President or his officers the authority to remove an alien enemy until that person has been given time to decide whether to depart on his own. See United States *ex rel.* Von Heymann v. Watkins, 159 F.2d 650, 653 (2d Cir. 1947) (directing district court to release detainee unless government showed, "within a reasonable time to be fixed by that court, that the [detainee] has refused or neglected to leave the country, after having been given a reasonable time so to do unhampered by his present restraint"). It follows that summary deportation following close on the heels of the Government's informing an alien that he is subject to the Proclamation — without giving him the opportunity to consider whether to voluntarily self-deport or challenge the basis for the order — is unlawful.

Members of the Plaintiff class therefore must be given the opportunity, if they so choose, to contest that they are "Venezuelan citizens 14 years of age or older who are members of [Tren de Aragua], are within the United States, and are not actually naturalized or lawful permanent residents of the United States." 90 Fed. Reg. at 13034, § 1. The form that challenge must take, and the standards used in adjudicating it, must await answers at a future date. In the meantime, the Plaintiff class may not be removed under the Proclamation.

3. *Separate Statutory Restrictions on Removal*

There may well also be independent restrictions on the Government's ability to deport class members — at least to Salvadoran prisons — even if they do fall within the Proclamation's terms. Plaintiffs additionally contend that Defendants violated the Foreign Affairs Reform and Restructuring Act (FARRA) in removing them without regard to legally binding humanitarian protections. See Compl., ¶¶ 88–91; 8 U.S.C. § 1231 notes. The Government counters that this contrary-to-law claim cannot be reviewed, and, even if it could, it is unmeritorious because "alien enemies are not entitled to seek any relief or protection." Mot. to Vacate at 19–20 (citing Clark, 155 F.2d at 294); id. at 1. Plaintiffs disagree, retorting that "humanitarian protections . . . remain available regardless of a noncitizen's status or circumstances." Opp. at 34. To prevail, Plaintiffs must show first that the Court has jurisdiction to hear their claim, and second that they are eligible for — and have been denied the opportunity to apply for — those protections.

FARRA, which codifies the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), states: "It shall be the policy of the United States not to expel . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." 8 U.S.C. § 1231 notes; see also 8 C.F.R. §§ 208.16 to 208.18 (FARRA procedure). While FARRA contains a limiting clause that it shall not provide "any court jurisdiction to consider . . . claims raised under the Convention . . . except as part of the review of a final order of removal pursuant to [the INA]," 8 U.S.C. § 1231 notes, that jurisdiction-stripping mandate pertains only to the review of the substance of CAT claims. Here, Plaintiffs do not contest any potential outcome of their CAT claims; rather, they assert that the Administration violated the APA by denying them any

opportunity to raise CAT claims before their deportation. See Compl., ¶ 90. Because Plaintiffs' cause of action is rooted in the APA rather than CAT, the Court has jurisdiction over this issue.

On the merits, Plaintiffs must first show that CAT protections apply to their deportations under the Proclamation. In Huisha-Huisha v. Mayorkas, 27 F.4th 718 (D.C. Cir. 2022), our Circuit addressed a strikingly similar claim. To be sure, the Court of Appeals cautioned that because it was reviewing a preliminary injunction, its treatment of the issue was not binding precedent. See id. at 733. This Court, however, finds its reasoning persuasive.

The Huisha-Huisha panel concluded that while the Executive could deport migrants pursuant to a public-health authority, see 42 U.S.C. § 265, it was likely required to provide them FARRA protections before doing so, meaning that it could not remove them to any "place[] where they [would] be persecuted or tortured." 27 F.4th at 722. The Circuit observed that while § 265 authorized the Executive to expel aliens, the law was silent about "where to expel" them. Id. at 721; see id. at 732. While FARRA, conversely, does not speak to "whether the Executive can expel aliens," it plainly puts a "limit" on "where aliens can be expelled [to]." Id. at 731–32. Because the statutes governed distinct issues and did not conflict, the court reasoned, it likely could "give effect to both." Id. at 732 (citing Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic," a court "must . . . strive to give effect to both.") (cleaned up)).

This case is on all fours. Here, even assuming *arguendo* that the Alien Enemies Act provides the President with the power to remove Plaintiffs, it says nothing about the limits on countries to which they can or should be removed. As the Huisha-Huisha court observed, FARRA does: it dictates the process that must occur before individuals may be removed to places where they fear torture. See Mot. to Vacate at 18 ("[T]here is no conflict between the

AEA and the INA."). Since both statutes can be given meaning, the Court must do so, and FARRA protections are likely available to those removed under the Act.

Plaintiffs claim that they never received the opportunity to request protection under CAT from being deported to El Salvador. Instead, they aver that when the Government loaded them on to planes on the morning of March 15, they were not only prevented from claiming CAT protection, but also not informed where they were being taken. See Shealy Decl., ¶ 10 ("On the plane, . . . detainees asked the officers where they were being taken. The officers would only say that they didn't know and then laughed."); Carney Decl., ¶ 12. Without such information, even if they had been given an opportunity to raise a torture claim, they would not have been able to meaningfully do so. As discussed in Section III.C, *infra*, the evidence at this point shows a likelihood of potential torture should Plaintiffs be removed to El Salvador and incarcerated there. To the extent that Defendants seek to remove Plaintiffs to that destination, CAT could stand as an independent obstacle.

C. Irreparable Harm

Convinced that Plaintiffs are likely to succeed, the Court now turns to the other factors governing preliminary relief. Irreparable harm is undoubtedly "a high standard." Chaplaincy of Full Gospel Churches, 454 F.3d at 297. The harm "must be both certain and great," "actual and not theoretical," and "of such imminence that there is a clear and present need for equitable relief." Id. (cleaned up). It must also be "beyond remediation," meaning that "the possibility [of] adequate compensatory or other corrective relief . . . at a later date . . . weighs heavily against a claim of irreparable harm." Id. at 297–98 (quoting Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Plaintiffs readily meet these criteria, even though the Court acknowledges that removal alone does not necessarily do the trick. See Nken v. Holder, 556 U.S. 418, 435 (2009). In Salvadoran prisons, deportees are reportedly "highly likely to face immediate and intentional life-threatening harm at the hands of state actors." ECF No. 44-4 (Sarah Bishop Decl.), ¶ 63. The country's government has boasted that inmates in CECOT "never leave"; indeed, one expert declarant alleges that she does not know of any CECOT inmate who has been released. See ECF No. 44-3 (Juanita Goebertus Decl.), ¶ 3; see also Bishop Decl., ¶ 23 ("[W]e will throw them in prison and they will never get out.") (quoting Nayib Bukele (@nayibbukele), X (May 16, 2023, 7:02 p.m.), https://x.com/nayibbukele/status/1658608915683201030?s=20). Once inmates enter the prisons, moreover, their families are often left in the dark. See Bishop Decl., ¶ 25 ("In a sample of 131 cases, [it was] found that 115 family members of detainees have not received any information about the whereabouts or wellbeing of their detained family members since the day of their capture.").

Plaintiffs offer declarations that inmates are rarely allowed to leave their cells, have no regular access to drinking water or adequate food, sleep standing up because of overcrowding, and are held in cells where they do not see sunlight for days. See Goebertus Decl., ¶¶ 3, 11; Bishop Decl., ¶ 31. At CECOT specifically, one declarant states that "if the prison were to reach full supposed capacity . . . , each prisoner would have less than two feet of space in shared cells . . . [which] is less than half the space required for transporting midsized cattle under EU law." Bishop Decl., ¶ 30. Given poor sanitary conditions, Goebertus points out, "tuberculosis, fungal infections, scabies, severe malnutrition[,] and chronic digestive issues [a]re common." Goebertus Decl., ¶ 12.

Beyond poor living conditions, Salvadoran inmates are, according to evidence presented, often disciplined through beatings and humiliation. One inmate claimed that "police beat prison newcomers with batons . . . . [W]hen he denied being a gang member, they sent him to a dark basement cell with 320 detainees, where prison guards and other detainees beat him every day. On one occasion, one guard beat him so severely that [he] broke a rib." Id., ¶ 8. Three prior deportees from the United States reported being kicked in the face, neck, abdomen, and testicles, with one requiring "an operation for a ruptured pancreas and spleen." Id., ¶ 17. One inmate reported being forced to "kneel on the ground naked looking downwards for four hours in front of the prison's gate." Id., ¶ 10. That same prisoner also said that he was made to sit in a barrel of ice water as guards questioned him and then forced his head under water so he could not breathe. Id.

One scholar avers that, since March 2022, an estimated 375 detainees have died in Salvadoran prisons. See Bishop Decl., ¶¶ 15, 43. Although the Salvadoran government maintains that all deaths have been natural, others respond that 75% of them "were violent, probably violent, or with suspicions of criminality on account of a common pattern of hematomas caused by beatings, sharp object wounds, and signs of strangulation on the cadavers examined." Id., ¶¶ 44–45. When an inmate is killed, there are also reports that guards "bring the body back into the cells and leave it there until the body start[s] stinking." Id., ¶ 39. Needless to say, the risk of torture, beatings, and even death clearly and unequivocally supports a finding of irreparable harm. See, e.g., United States v. Iowa, 126 F.4th 1334, 1352 (8th Cir. 2025) (torture); Leiva-Perez v. Holder, 640 F.3d 962, 970 (9th Cir. 2011) (physical abuse).

D. Balance of Equities and Public Interest

The last factors, which the Court considers together where the Government is a party, examine "the balance of equities" and "the public interest." Sherley, 644 F.3d at 392 (quoting Winter, 555 U.S. at 20); see also Nken, 566 U.S. at 435.

While the Government surely suffers harm whenever its removal orders are stymied, here such harms do not outweigh Plaintiffs' need for preliminary relief. The Government, recall, is required only to abstain from removing the Plaintiff class from the United States solely on the basis of the Proclamation; in other words, removal under other statutes is permitted. Defendants point to no concrete problems that could attend that narrow restriction, instead alluding to vague foreign-policy and national-security concerns. See Mot. to Vacate at 23–24. That is insufficient. As examples of potential harm, Defendants cite only the importance of "prevent[ing] the entry of illegal aliens" and the potential "danger[]" of the individuals involved. See id. at 23 (quotation marks omitted). Neither is at issue here: the TROs impose no restriction on the Government's apprehending alleged members of Tren de Aragua under the contested authority of the Proclamation, not does it require that any individual — dangerous or otherwise — be released from custody. To be sure, there is generally "a public interest in prompt execution of removal orders," but that interest is diminished when, among other things, the public is not in particular danger. See Nken, 556 U.S. at 436. The noncitizens comprising the class are already in United States custody, and any actual Tren de Aragua member is already subject to deportation as a member of an FTO, so there is little additional harm to the public by temporarily preventing their removal.

By contrast, Plaintiffs — as just explained — have shown that they have a high likelihood of suffering significant harm if the Proclamation is allowed to apply to them. There

is, moreover, a strong public interest in preventing the mistaken deportation of people based on categories they have no right to challenge. See id. ("Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm."). The public also has a significant stake in the Government's compliance with the law. See, e.g., League of Women Voters v. Newby, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.") (quotation marks and citations omitted).

As the Government's asserted harms do not outweigh those Plaintiffs face, the Court finds that the balance of equities tips in Plaintiffs' favor, and that preliminary relief is in the public interest.

IV. Conclusion

For the foregoing reasons, the Court will deny Defendants' Motion to Vacate the TRO. A separate Order so stating will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
Chief Judge

Date: March 24, 2025

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.G.G., *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Civil Action No. 25-766 (JEB)**

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendants' [26] Motion to Vacate is DENIED; and
2. If Plaintiffs wish to convert the Temporary Restraining Order into a preliminary injunction, they shall so inform the Court by March 26, 2025.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
Chief Judge

Date: March 24, 2025

APPEAL,PSEUDO-GR,TYPE-D

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:25-cv-00766-JEB

J.G.G. et al v. TRUMP et al
Assigned to: Chief Judge James E. Boasberg
Case in other court: USCA, 25-05068
USCA, 25-05068
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 03/15/2025
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Plaintiff

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ATTORNEY TO BE NOTICED

Ashley Gorski
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Plaintiff

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Plaintiff

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Plaintiff

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V.

Defendant

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in his official capacity as President of the United States

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Defendant

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August Edward Flentje
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Christina Greer
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Defendant

KRISTI NOEM
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Defendant

U.S. DEPARTMENT OF HOMELAND SECURITY

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Defendant

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Defendant

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Defendant

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Defendant

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Movant

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The Honorable

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Movant

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Movant

MITCHEL A. SOLLENBERGER represented by **Kelly Brian McClanahan**
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Date Filed	#	Docket Text
03/15/2025	1	COMPLAINT against All Defendants (Filing fee $ 405 receipt number ADCDC-11544662) filed by J.G.O., G.F.F., J.G.G., W.G.H., J.A.V.. (Attachments: # 1 Civil Cover Sheet, # 2 Summons Donald J. Trump, # 3 Summons Pamela Bondi, # 4 Summons Kristi Noem, # 5 Summons DHS, # 6 Summons Madison Sheahan, # 7 Summons ICE, # 8 Summons Marco Rubio, # 9 Summons DOS, # 10 Summons USAO)(Gelernt, Lee) (Entered: 03/15/2025)
03/15/2025	2	SEALED MOTION to Proceed Under Pseudonym filed by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V. (Attachments: # 1 Declaration of J.G.G., # 2 Declaration of W.G.H., # 3 Declaration of Molly Lauterback, # 4 Declaration of J.A.V., # 5 Declaration of Grace Carney, # 6 Text of Proposed Order)(Gelernt, Lee) (Entered: 03/15/2025)
03/15/2025	3	MOTION for Temporary Restraining Order by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Attachments: # 1 Certificate of Counsel, # 2 Memorandum in Support, # 3 Declaration of J.G.G., # 4 Declaration of Grace Carney, # 5 Declaration of J.G.O., # 6 Declaration of W.G.H., # 7 Declaration of Molly Laterback, # 8 Declaration of J.A.V., # 9 Text of Proposed Order)(Gelernt, Lee) (Entered: 03/15/2025)
03/15/2025	4	MOTION to Certify Class by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Attachments: # 1 Declaration of Daniel Galindo, # 2 Text of Proposed Order)(Gelernt, Lee) (Entered: 03/15/2025)
03/15/2025	5	NOTICE of Appearance by Daniel Antonio Galindo on behalf of All Plaintiffs (Galindo, Daniel) (Entered: 03/15/2025)
03/15/2025		MINUTE ORDER granting 2 SEALED MOTION to Proceed Under Pseudonym. The Court has reviewed Plaintiffs' 2 Motion to Proceed Pseudonymously. Given the expedited nature of this matter, it determines that a full Opinion is not practical at this time. Believing that Plaintiffs have made the required showing on the relevant factors, the Court ORDERS

		that: 1) Their 2 Motion is GRANTED; and 2) They shall be permitted to proceed pseudonymously unless and until the assigned judge determines otherwise. Signed by Chief Judge James E. Boasberg on 3/15/2025. (zjd) Modified on 3/15/2025 (zjd). (Entered: 03/15/2025)
03/15/2025		Case Assigned to Chief Judge James E. Boasberg. (zjd) (Entered: 03/15/2025)
03/15/2025	6	SUMMONS (9) Issued Electronically as to All Defendants, U.S. Attorney, and U.S. Attorney General. (Attachments: # 1 Notice and Consent) (zjd) (Entered: 03/15/2025)
03/15/2025	7	NOTICE of Appearance by Bradley Girard on behalf of All Plaintiffs (Girard, Bradley) (Entered: 03/15/2025)
03/15/2025		MINUTE ORDER: The Court has reviewed Plaintiffs' Complaint and Motion for Temporary Restraining Order. Given the exigent circumstances that it has been made aware of this morning, it has determined that an immediate Order is warranted to maintain the status quo until a hearing can be set. As Plaintiffs have satisfied the four factors governing the issuance of preliminary relief, the Court accordingly ORDERS that: 1) Plaintiffs' 3 Motion for TRO is GRANTED; 2) Defendants shall not remove any of the individual Plaintiffs from the United States for 14 days absent further Order of the Court; and 3) The parties shall appear for a Zoom hearing on March 17, 2025, at 4:00 p.m. The hearing will proceed by videoconference for the parties and by telephone for members of the public. Toll free number: 833-990-9400. Meeting ID: 049550816. So ORDERED by Chief Judge James E. Boasberg on 3/15/2025. (lcjeb1) Modified to add public access line on 3/15/2025 (znbn). (Entered: 03/15/2025)
03/15/2025	8	NOTICE of Appearance by Skye Perryman on behalf of All Plaintiffs (Perryman, Skye) (Entered: 03/15/2025)
03/15/2025	9	NOTICE of Appearance by Somil Trivedi on behalf of All Plaintiffs (Trivedi, Somil) (Entered: 03/15/2025)
03/15/2025		MINUTE ORDER: The Court ORDERS that the parties shall appear for Zoom hearing on Plaintiffs' 4 Motion for Class Certification on March 15, 2025, at 5:00 p.m. The hearing will proceed by videoconference for the parties and by telephone for members of the public. Toll free number: 833-990-9400. Meeting ID: 049550816. So ORDERED by Chief Judge James E. Boasberg on 3/15/2025. (lcjeb1) (Entered: 03/15/2025)
03/15/2025	10	NOTICE of Appearance by Scott Michelman on behalf of All Plaintiffs (Michelman, Scott) (Entered: 03/15/2025)
03/15/2025		Set/Reset Hearings: Hearing set for 3/17/2025 at 04:00 PM via Zoom (Audio Line Available) before Chief Judge James E. Boasberg. (znbn) Modified to correct hearing location on 3/15/2025 (znbn). (Entered: 03/15/2025)
03/15/2025	11	NOTICE of Appearance by Christina Greer on behalf of All Defendants (Greer, Christina) (Entered: 03/15/2025)
03/15/2025	12	NOTICE OF APPEAL TO DC CIRCUIT COURT as to Order on Motion for TRO,,, by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY. Fee Status: No Fee Paid. Parties have been notified. (Greer, Christina) (Entered: 03/15/2025)
03/15/2025	13	NOTICE of Appearance by Arthur B. Spitzer on behalf of All Plaintiffs (Spitzer, Arthur) (Entered: 03/15/2025)
03/15/2025	14	Transmission of the Notice of Appeal, Minute Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the appeal was

		filed by the government re 12 Notice of Appeal to DC Circuit Court. (zjd) (Entered: 03/15/2025)
03/15/2025	15	ENTERED IN ERROR.....NOTICE of Appearance by Christina Greer on behalf of All Defendants (Greer, Christina) Modified on 3/17/2025; refiled as docket entry 16 (znmw). (Entered: 03/15/2025)
03/15/2025	16	NOTICE of Appearance by Drew C Ensign on behalf of All Defendants (Ensign, Drew) (Entered: 03/15/2025)
03/15/2025		Minute Entry for proceedings held before Chief Judge James E. Boasberg: Motion Hearing held via Zoom (with public access line) on 3/15/2025 re 4 MOTION to Certify Class filed by J.G.O., W.G.H., J.G.G., G.F.F., J.A.V.. Oral arguments heard. Order forthcoming. (Court Reporter Tammy Nestor) (znbn) (Entered: 03/15/2025)
03/15/2025		MINUTE ORDER: As discussed in today's hearing, the Court ORDERS that: 1) Plaintiffs' 4 Motion for Class Certification is GRANTED insofar as a class consisting of "All noncitizens in U.S. custody who are subject to the March 15, 2025, Presidential Proclamation entitled 'Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua' and its implementation" is provisionally certified; 2) The Government is ENJOINED from removing members of such class (not otherwise subject to removal) pursuant to the Proclamation for 14 days or until further Order of the Court; 3) The Government shall file any Motion to Vacate this TRO by March 17, 2025, with Plaintiffs' Opposition due by March 19, 2025; and 4) The hearing set for March 17, 2025, is VACATED and RESET for March 21, 2025, at 2:30 p.m. via Zoom. So ORDERED by Chief Judge James E. Boasberg on 3/15/2025. (lcjeb1) (Entered: 03/15/2025)
03/15/2025	17	NOTICE OF APPEAL TO DC CIRCUIT COURT as to Order on Motion to Certify Class,,,, Set/Reset Deadlines,,, by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY. Fee Status: No Fee Paid. Parties have been notified. (Greer, Christina) (Entered: 03/15/2025)
03/15/2025	18	Transmission of the Notice of Appeal, Minute Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the appeal was filed by the government re 17 Notice of Appeal to DC Circuit Court. (zjd) (Entered: 03/15/2025)
03/15/2025		USCA Case Number 25-5067 for 12 Notice of Appeal to DC Circuit Court, filed by DONALD J. TRUMP, MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. DEPARTMENT OF HOMELAND SECURITY, KRISTI NOEM, U.S. STATE DEPARTMENT, PAMELA BONDI. (zjm) Modified on 3/17/2025 to correct case number (zjm). (Entered: 03/17/2025)
03/15/2025		USCA Case Number 25-5068 for 17 Notice of Appeal to DC Circuit Court, filed by DONALD J. TRUMP, MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. DEPARTMENT OF HOMELAND SECURITY, KRISTI NOEM, U.S. STATE DEPARTMENT, PAMELA BONDI. (zjm) (Entered: 03/17/2025)
03/16/2025	19	NOTICE by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY (Ensign, Drew) (Entered: 03/16/2025)
03/16/2025	20	TRANSCRIPT OF PROCEEDINGS before Chief Judge James E. Boasberg held on 3/15/25; Page Numbers: 1-47. Court Reporter/Transcriber Tammy Nestor,

		tammy_nestor@dcd.uscourts.gov, Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 4/6/2025. Redacted Transcript Deadline set for 4/16/2025. Release of Transcript Restriction set for 6/14/2025.(Nestor, Tammy) (Entered: 03/16/2025)
03/17/2025	21	RESPONSE re 19 Notice (Other) filed by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Gelernt, Lee) (Entered: 03/17/2025)
03/17/2025		MINUTE ORDER: The Court ORDERS that the parties shall appear in person (or by Zoom if necessary) for a hearing at 4:00 p.m. today regarding the 19 Notice and 21 Response. The Government shall be prepared to provide answers to the questions raised by Plaintiffs on page 6 of their Response. So ORDERED by Chief Judge James E. Boasberg on 3/17/2025. (lcjeb1) (Entered: 03/17/2025)
03/17/2025		MINUTE ORDER: The Court ORDERS that, in order to accommodate the parties' schedules, the hearing set for today at 4:00 p.m. is VACATED and RESET for 5:00 p.m. The hearing will proceed in-person for the parties and by telephone for members of the public. Toll free number: 833-990-9400. Meeting ID: 049550816. Any use of the public-access telephone line requires adherence to the general prohibition against photographing, recording, livestreaming, and rebroadcasting of court proceedings (including those held by telephone or videoconference), as set out in Standing Order No. 24-31 (JEB). Violation of these prohibitions may result in sanctions, including removal of court-issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or other sanctions deemed necessary by the Court. So ORDERED by Chief Judge James E. Boasberg on 3/17/2025. (lcjeb1) (Entered: 03/17/2025)
03/17/2025	22	NOTICE of Appearance by August Edward Flentje on behalf of All Defendants (Flentje, August) (Entered: 03/17/2025)
03/17/2025		Set/Reset Hearings: Miscellaneous Hearing set for 3/17/2025 at 05:00 PM in Courtroom 22A- In Person (Audio Line Available) before Chief Judge James E. Boasberg. Motion Hearing set for 3/21/2025 at 02:30 PM via Zoom (Audio Line Available) before Chief Judge James E. Boasberg. (znbn) (Entered: 03/17/2025)
03/17/2025	23	NOTICE of Appearance by Abhishek Kambli on behalf of All Defendants (Kambli, Abhishek) (Entered: 03/17/2025)
03/17/2025	24	MOTION to Vacate *Response and Motion to Vacate Hearing* re 19 Notice (Other), Order,,,, Set Hearings,,, Set/Reset Hearings, 21 Response to Document by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY. (Ensign, Drew) Modified event on 3/17/2025 (znmw). (Entered: 03/17/2025)

03/17/2025		MINUTE ORDER: The Court ORDERS that Defendants' 24 Motion to Vacate is DENIED. The hearing will proceed as scheduled. So ORDERED by Chief Judge James E. Boasberg on 3/17/2025. (lcjeb1) (Entered: 03/17/2025)
03/17/2025		Minute Entry for proceedings held before Chief Judge James E. Boasberg: Hearing held on 3/17/2025. Oral arguments heard. Order forthcoming. (Court Reporter Tammy Nestor) (znbn) (Entered: 03/17/2025)
03/17/2025		MINUTE ORDER: As discussed in today's hearing, the Court ORDERS that by 12:00 p.m. on March 18, 2025, the Government shall file a Notice, which may, if necessary, be sealed in part, setting forth: 1) A sworn declaration that no one on any flight departing the United States after 7:25 p.m. on March 15, 2025, was removed solely on the basis of the Proclamation at issue; 2) A sworn declaration setting forth when the Proclamation at issue was signed, when it was made public, and when it went into effect; 3) The Government's best estimate of the number of individuals subject to the Proclamation currently remaining in the United States and how many are currently in U.S. custody; and 4) The Government's position on whether, and in what form, it will provide answers to the Court's questions regarding the particulars of the flights. Such form could include *in camera* review or in a classified setting. If the Government takes the position that it will not provide that information to the Court under any circumstances, it must support such position, including with classified authorities if necessary. So ORDERED by Chief Judge James E. Boasberg on 3/17/2025. (lcjeb1) (Entered: 03/17/2025)
03/17/2025	25	TRANSCRIPT OF PROCEEDINGS before Chief Judge James E. Boasberg held on 3/17/25; Page Numbers: 1-31. Court Reporter/Transcriber Tammy Nestor, tammy_nestor@dcd.uscourts.gov, Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 4/7/2025. Redacted Transcript Deadline set for 4/17/2025. Release of Transcript Restriction set for 6/15/2025.(Nestor, Tammy) (Entered: 03/17/2025)
03/17/2025	26	MOTION to Vacate re 3/15/2025 Minute Orders on Temporary Restraining Order and Certification of Class by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY. (Attachments: # 1 Declaration Declaration of Robert L. Cerna, # 2 Declaration Declaration of Michael G. Kozak)(Flentje, August) Modified event and docket text on 3/18/2025 (znmw). (Entered: 03/17/2025)
03/18/2025	27	NOTICE of Appearance by Hina Shamsi on behalf of All Plaintiffs (Shamsi, Hina) (Entered: 03/18/2025)
03/18/2025	28	NOTICE *in Response to March 17 Minute Order* by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S.

		DEPARTMENT OF HOMELAND SECURITY (Attachments: # 1 Affidavit Cerna Declaration)(Ensign, Drew) (Entered: 03/18/2025)
03/18/2025		MINUTE ORDER: The Court ORDERS that the Zoom hearing set for March 21, 2025, at 2:30 p.m. shall now take place in Courtroom 22A. Members of the public may attend in person or by telephone. Toll free number: 833-990-9400. Meeting ID: 049550816. Any use of the public-access telephone line requires adherence to the general prohibition against photographing, recording, livestreaming, and rebroadcasting of court proceedings (including those held by telephone or videoconference), as set out in Standing Order No. 24-31 (JEB). Violation of these prohibitions may result in sanctions, including removal of court-issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or other sanctions deemed necessary by the Court. So ORDERED by Chief Judge James E. Boasberg on 3/18/2025. (lcjeb1) (Entered: 03/18/2025)
03/18/2025	29	NOTICE of Appearance- Pro Bono by Noelle Smith on behalf of All Plaintiffs (Smith, Noelle) (Entered: 03/18/2025)
03/18/2025	30	NOTICE of Appearance- Pro Bono by Omar C. Jadwat on behalf of All Plaintiffs (Jadwat, Omar) (Entered: 03/18/2025)
03/18/2025		MINUTE ORDER: In response to Defendants' 28 Notice at page 2, the Court ORDERS that by 12:00 p.m. on March 19, 2025, Defendants shall file *ex parte* and under seal (or submit to the Court) a declaration providing the following details regarding each of the two flights leaving U.S. airspace before 7:25 p.m. on March 15, 2025: 1) What time did the plane take off from U.S. soil and from where? 2) What time did it leave U.S. airspace? 3) What time did it land in which foreign country (including if it made more than one stop)? 4) What time were individuals subject solely to the Proclamation transferred out of U.S. custody? and 5) How many people were aboard solely on the basis of the Proclamation? So ORDERED by Chief Judge James E. Boasberg on 3/18/2025. (lcjeb1) (Entered: 03/18/2025)
03/18/2025	31	NOTICE of Appearance- Pro Bono by Sidra Mahfooz on behalf of All Plaintiffs (Mahfooz, Sidra) (Entered: 03/18/2025)
03/18/2025	32	NOTICE of Appearance- Pro Bono by Oscar Sarabia Roman on behalf of All Plaintiffs (Sarabia Roman, Oscar) (Entered: 03/18/2025)
03/18/2025	33	NOTICE of Appearance- Pro Bono by Ashley Gorski on behalf of All Plaintiffs (Gorski, Ashley) (Entered: 03/18/2025)
03/18/2025	34	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Sarah M. Rich, Filing fee $ 100, receipt number ADCDC-11550426. Fee Status: Fee Paid. by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Attachments: # 1 Declaration, # 2 Certificate of Good Standing)(Girard, Bradley) (Entered: 03/18/2025)
03/18/2025	35	NOTICE of Appearance- Pro Bono by Patrick Toomey on behalf of All Plaintiffs (Toomey, Patrick) (Entered: 03/18/2025)
03/18/2025		MINUTE ORDER: The Court ORDERS that the 34 Motion for Leave to Appear Pro Hac Vice of Sarah Marion Rich is GRANTED. **Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a)**. Click for instructions. So ORDERED by Chief Judge James E. Boasberg on 3/18/2025. (lcjeb1) (Entered: 03/18/2025)
03/18/2025	36	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Audrey Wiggins, Filing fee $ 100, receipt number ADCDC-11551084. Fee Status: Fee Paid. by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Attachments: # 1 Declaration, # 2 Certificate of Good Standing)(Girard, Bradley) (Entered: 03/18/2025)

03/18/2025		MINUTE ORDER: The Court ORDERS that the 36 Motion for Leave to Appear Pro Hac Vice of Audrey J. Wiggins is GRANTED. **Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a)**. Click for instructions. So ORDERED by Chief Judge James E. Boasberg on 3/18/2025. (lcjeb1) (Entered: 03/18/2025)
03/19/2025	37	Emergency MOTION to Stay re Order,,,, Set Deadlines,,, by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY. (Ensign, Drew) (Entered: 03/19/2025)
03/19/2025	38	ORDER: The Court ORDERS that: 1) Defendants' 37 Motion is GRANTED IN PART and DENIED IN PART; and 2) Defendants shall have until March 20, 2025, at 12:00 p.m. to provide the information discussed in the Minute Order of March 18, 2025, or to invoke the state-secrets doctrine and explain the basis for such invocation. Signed by Chief Judge James E. Boasberg on March 19, 2025. (lcjeb3) (Entered: 03/19/2025)
03/19/2025	39	NOTICE of Appearance by Sarah Rich on behalf of J.G.G., G.F.F., J.G.O., W.G.H., J.A.V. (Rich, Sarah) (Entered: 03/19/2025)
03/19/2025	40	NOTICE of Appearance by Audrey Jordan Wiggins on behalf of J.G.G., G.F.F., J.G.O., W.G.H., J.A.V. (Wiggins, Audrey) (Entered: 03/19/2025)
03/19/2025	41	NOTICE of Appearance by Cody H. Wofsy on behalf of All Plaintiffs (Wofsy, Cody) (Entered: 03/19/2025)
03/19/2025	42	NOTICE OF WITHDRAWAL OF APPEARANCE as to MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY. Attorney Christina Greer terminated. (Greer, Christina) (Entered: 03/19/2025)
03/19/2025	43	NOTICE of Appearance- Pro Bono by My Khanh Ngo on behalf of All Plaintiffs (Ngo, My Khanh) (Entered: 03/19/2025)
03/19/2025	44	RESPONSE re 26 MOTION to Vacate *TRO* filed by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Attachments: # 1 Index of Exhibits, # 2 Declaration of Deborah Fleishaker, # 3 Declaration of Juanita Goebertus, # 4 Declaration of Sarah Bishop, # 5 Declaration of Linette Tobin, # 6 Declaration of Austin Thierry, # 7 Declaration of Osvaldo E. Caro-Cruz, # 8 Declaration of Katherine Kim, # 9 Declaration of Karyn Ann Shealy, # 10 Declaration of Stephanie Quintero, # 11 Declaration of Grace Carney, # 12 Declaration of Melissa Smyth, # 13 Declaration of Solanyer Michell Sarabia Gonzalez, # 14 Declaration of Jennifer Venghaus, # 15 Declaration of Oscar Sarabia Roman)(Gelernt, Lee) (Entered: 03/19/2025)
03/20/2025	45	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Christine L. Coogle, Filing fee $ 100, receipt number ADCDC-11556213. Fee Status: Fee Paid. by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Attachments: # 1 Declaration, # 2 Certificate of Good Standing) (Girard, Bradley) (Entered: 03/20/2025)
03/20/2025	46	NOTICE of Appearance by Michael Lawrence Waldman on behalf of J.G.G., G.F.F., J.G.O., W.G.H., J.A.V. (Waldman, Michael) (Entered: 03/20/2025)
03/20/2025	47	ORDER: The Court ORDERS that: 1) By March 21, 2025, at 10:00 a.m., Defendants shall submit a sworn declaration by a person with direct involvement in the Cabinet-level discussions regarding invocation of the state-secrets privilege; 2) By March 25, 2025, Defendants shall submit a declaration indicating whether or not the Government is invoking the privilege; 3) By March 25, 2025, Defendants shall file a brief showing cause

		why they did not violate the Court's Temporary Restraining Orders by failing to return class members removed from the United States on the two earliest planes that departed on March 15, 2025; and 4) Plaintiffs may file any response to such brief by March 31, 2025. Signed by Chief Judge James E. Boasberg on 3/20/2025. (lcjeb1) (Entered: 03/20/2025)
03/20/2025	48	MOTION for Leave to File *Amicus Curiae Brief* by BRANDON GILL. (Attachments: # 1 Exhibit Proposed Brief, # 2 Text of Proposed Order)(Block, Andrew) (Entered: 03/20/2025)
03/20/2025	49	NOTICE by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY (Attachments: # 1 Declaration Declaration of Robert L. Cerna)(Flentje, August) (Entered: 03/20/2025)
03/20/2025		MINUTE ORDER: The Court ORDERS that the 45 Motion for Leave to Appear Pro Hac Vice of Christine L. Coogle is GRANTED. **Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a)**. Click for instructions. Signed by Chief Judge James E. Boasberg on 3/20/2025. (lcjeb1) (Entered: 03/20/2025)
03/21/2025	50	RESPONSE TO ORDER OF THE COURT re 47 Order by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY (Attachments: # 1 Declaration)(Flentje, August) Modified event title on 3/21/2025 (znmw). (Entered: 03/21/2025)
03/21/2025		Minute Entry for proceedings held before Chief Judge James E. Boasberg: Motion Hearing held on 3/21/2025. Oral arguments heard. Order forthcoming. (Court Reporter Sonja Reeves) (znbn) (Entered: 03/21/2025)
03/21/2025		MINUTE ORDER: The Court ORDERS that Amicus's 48 Motion for Leave to File is DENIED as untimely. Filing the night before the hearing does not permit the Court sufficient time to consider the arguments asserted. So ORDERED by Chief Judge James E. Boasberg on 3/21/2025. (lcjeb1) (Entered: 03/21/2025)
03/21/2025	51	TRANSCRIPT OF MOTION HEARING before Chief Judge James E. Boasberg held on March 21, 2025; Page Numbers: 1-65. Date of Issuance:March 21, 2025. Court Reporter/Transcriber Sonja L. Reeves, RDR, CRR, Sonja_Reeves@dcd.uscourts.gov, Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 4/11/2025. Redacted Transcript Deadline set for 4/21/2025. Release of Transcript Restriction set for 6/19/2025.(Reeves, Sonja) (Entered: 03/21/2025)
03/24/2025	52	ORDER: For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that: 1) Defendants' 26 Motion to Vacate is DENIED; and 2) If Plaintiffs wish to

		convert the Temporary Restraining Order into a preliminary injunction, they shall so inform the Court by March 26, 2025. Signed by Chief Judge James E. Boasberg on 3/24/2025. (lcjeb1) (Entered: 03/24/2025)
03/24/2025	53	MEMORANDUM OPINION re 52 Order on Motion to Vacate. Signed by Chief Judge James E. Boasberg on 3/24/2025. (lcjeb1) (Entered: 03/24/2025)
03/24/2025	54	NOTICE of Appearance by Christine L. Coogle on behalf of J.G.G., G.F.F., J.G.O., W.G.H., J.A.V. (Coogle, Christine) (Entered: 03/24/2025)
03/24/2025	55	NOTICE *in Response to March 19 Minute Order* by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V. re 47 Order,,,, Set Deadlines,,, (Attachments: # 1 Exhibit A: Declaration of S.Z.F.R., # 2 Exhibit B: Declaration of E.E.P.B.)(Gelernt, Lee) (Entered: 03/24/2025)
03/24/2025	56	NOTICE *Invoking State Secrets Privilege* by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY re 47 Order,,,, Set Deadlines,,, (Attachments: # 1 Affidavit Attorney General Bondi Declaration, # 2 Affidavit Secretary Rubio Declaration, # 3 Affidavit Secretary Noem Declaration)(Ensign, Drew) (Entered: 03/24/2025)
03/25/2025		MINUTE ORDER: Given the Government's 56 Notice Invoking State Secrets Privilege, the Court ORDERS that if Plaintiffs wish to respond, they shall file any Response by March 31, 2025. So ORDERED by Chief Judge James E. Boasberg on 3/25/2025. (lcjeb1) (Entered: 03/25/2025)
03/25/2025	57	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Pooja A. Boisture, Filing fee $ 100, receipt number ADCDC-11566919. Fee Status: Fee Paid. by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V.. (Attachments: # 1 Declaration, # 2 Certificate of Good Standing)(Girard, Bradley) (Entered: 03/25/2025)
03/25/2025	58	RESPONSE TO ORDER TO SHOW CAUSE re 47 Order by MADISON SHEAHAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MARCO RUBIO, U.S. STATE DEPARTMENT, DONALD J. TRUMP, PAMELA BONDI, KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY. (Ensign, Drew) Modified event title on 3/26/2025 (znmw). (Entered: 03/25/2025)
03/25/2025	59	LEAVE TO FILE DENIED- Janice Wolk Grenadier - Motion. This document is unavailable as the Court denied its filing. Pro Se party has been notified by first class mail. "Leave to file DENIED." Signed by Chief Judge James E. Boasberg on 3/25/2025. (zjm) (Entered: 03/26/2025)
03/26/2025		MINUTE ORDER: The Court ORDERS that the 57 Motion for Leave to Appear Pro Hac Vice of Pooja Ashok Boisture is GRANTED. **Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a)**. Click for instructions. Signed by Chief Judge James E. Boasberg on 3/26/2025. (lcjeb1) (Entered: 03/26/2025)
03/26/2025	60	Unopposed MOTION for Leave to File Amicus Brief by MARK J. ROZELL, HEIDI KITROSSER, MITCHEL A. SOLLENBERGER. (Attachments: # 1 Text of Proposed Order)(McClanahan, Kelly) (Entered: 03/26/2025)
03/26/2025		MINUTE ORDER: The Court ORDERS that: 1) The consent 60 Motion for Leave to File Amicus Brief is GRANTED; and 2) Movants shall file any such brief by April 1, 2025. So ORDERED by Chief Judge James E. Boasberg on 3/26/2025. (lcjeb1) (Entered: 03/26/2025)

03/26/2025	61	NOTICE *Regarding Plaintiffs' Motion for a Preliminary Injunction* by J.G.G., G.F.F., J.G.O., W.G.H., J.A.V. (Gelernt, Lee) (Entered: 03/26/2025)
03/26/2025		MINUTE ORDER: Given Plaintiffs' 61 Notice, the Court ORDERS that: 1) Plaintiffs shall file a Motion to Extend the TRO by 5:00 p.m. on March 27, 2025, and Defendants shall file any Opposition by 12:00 p.m. on March 28, 2025; 2) Plaintiffs shall file their PI Motion by March 28, 2025; Defendants' Opposition shall be due by April 1, 2025; and Plaintiffs' Reply shall be due by April 4, 2025; and 3) The parties shall appear for a hearing on the Motion on April 8, 2025, at 3:00 p.m. So ORDERED by Chief Judge James E. Boasberg on 3/26/2025. (lcjeb1) (Entered: 03/26/2025)

DECLARATION OF MICHAEL G. KOZAK

Pursuant to 28 U.S.C. § 1746, I, Michael G. Kozak, declare and state as follows:

1. I, Michael G. Kozak, am the Senior Bureau Official within the Bureau of Western Hemisphere Affairs (WHA) of the United States Department of State, a position I have held since January 2025. In that capacity, I lead and oversee WHA, including the country offices handling affairs regarding Central and South America and other countries in the Hemisphere. I am a career member of the Senior Executive Service, and have served in a variety of senior positions in the Department of State, including previously as the Acting Assistant Secretary of WHA, in other positions within WHA, and leading other bureaus and offices of the Department of State. WHA is responsible for diplomatic relations between the United States and countries in the Western Hemisphere, including El Salvador and Venezuela. I make the following statements based upon my personal knowledge, including from my extensive experience since 1971 engaging in diplomatic and other work of the Department with respect to El Salvador, Venezuela, and other countries in the region and around the world, as well as upon information made available to me in the performance of my official duties.
2. U.S. government officials from the White House and the Department of State, including special Presidential envoy Richard Grenell, Secretary of State Marco Rubio, and Special Envoy for Latin America Mauricio Claver-Carone, have negotiated at the highest levels with the Government of El Salvador and with Nicolas Maduro and his representatives in Venezuela in recent weeks for those countries to consent to the removal to Venezuela and El Salvador of some number of Venezuelan nationals detained in the United States who are associated with Tren de Aragua (TdA), a designated foreign terrorist organization.

3. Arrangements were recently reached to this effect with these foreign interlocutors to accept the removal of some number of Venezuelan members of TdA. These arrangements were the result of intensive and delicate negotiations between the United States and El Salvador, and between the United States and representatives of the Maduro regime.
4. The foreign policy of the United States would suffer harm if the removal of individuals associated with TdA were prevented, taking into account the significant time and energy expended over several weeks by high-level U.S. government officials and the possibility that foreign interlocutors might change their minds regarding their willingness to accept certain individuals associated with TdA removed or might otherwise seek to leverage this as an ongoing issue. These harms could arise even in the short term, as future conversations with foreign interlocutors seeking to resolve foreign policy matters would need to take this issue into account along with other issues, instead of allowing the discussions to fully move on to other issues.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on March 15, 2025, in Arlington, Virgina.

MICHAEL G. KOZAK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.G.G., *et al.*,

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

No. 1:25-cv-766 (JEB)

Declaration Of Acting Field Office Director Robert L. Cerna

DECLARATION OF ROBERT L. CERNA

I, Robert L. Cerna, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am an Acting Field Office Director Enforcement and Removal Operations ("ERO") at U.S. Immigration and Customs Enforcement ("ICE") within the U.S. Department of Homeland Security ("DHS").

2. As the (A)FOD of the Harlingen Field Office, I am responsible for, among other things, the detention and enforcement operations of more than 350 employees, assigned to six ERO Harlingen offices. ERO Harlingen encompasses fifteen South Texas counties and is responsible for six detention facilities with a combined total of 3,790 detention beds. I began my career with the U.S. Government as a detention enforcement officer with the former Immigration and Naturalization Service in Laredo, TX. Over time I was promoted into ICE leadership positions, including Supervisory Detention and Deportation Officer for both the Harlingen and

San Antonio Field Offices and Assistant Field Office Director and Deputy Field Office Director for the Harlingen Field Office.

3. I am aware that the instant lawsuit has been filed regarding the removal of Venezuelan members of Tren de Aragua ("TdA") pursuant to the Alien Enemies Act (AEA).

4. I provide this declaration based on my personal knowledge, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, and information portals maintained and relied upon by DHS in the regular course of business.

5. On March 15, 2025, President Trump announced the Proclamation *Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua* stating that, "Evidence irrefutably demonstrates that TdA has invaded the United States and continues to invade, attempt to invade, and threaten to invade the country; perpetrated irregular warfare within the country; and used drug trafficking as a weapon against our citizens" (the Proclamation) (https://www.whitehouse.gov/presidential-actions/2025/03/invocation-of-the-alien-enemies-act-regarding-the-invasion-of-the-united-states-by-tren-de-aragua/). In the same Proclamation, President Trump announced that, pursuant to 50 U.S.C. § 21, "all Venezuelan citizens 14 years of age or older who are members of TdA, are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies."

6. Members of TdA pose an extraordinary threat to the American public. TdA members are involved in illicit activity to invoke fear and supremacy in neighborhoods and with the general population. This has been evident from investigations throughout the nation where TdA members coalesce to conduct their criminal acts. For example, TdA's takeover of Denver apartment buildings stoked fear in the tenants when TdA committed burglaries, narcotics, and

weapons violations. Other inquiries into the actions of member of TdA have resulted in criminal investigations and prosecution of cases of human trafficking, to include trafficking of women from Venezuela; bank fraud; federal narcotics violations; extortion of human smuggling victims; and homicide, to name a few. This, along with the myriad state violations and investigations of groups of TdA members committing crimes throughout the nation are evidence of their criminal enterprise.

7. Agency personnel carefully vetted each individual alien to ensure they were in fact members of TdA. Officers and agents well versed in gang activity in general and TdA in particular reviewed the information gathered on each alien, identifying TdA members based upon the results of investigative techniques and information such as previous criminal convictions for TdA-related activities, other court records indicating membership in TdA, surveillance, law enforcement encounters, interviews with the TdA member, testimonies and statements from victims of the TdA member, evidence that the alien had committed crimes in coordination with known members of TdA, evidence that the alien had committed sophisticated financial transactions with known members of TdA, computer indices checks, and admission of TdA membership by the alien. ICE did not simply rely on social media posts, photographs of the alien displaying gang-related hand gestures, or tattoos alone.

8. It was critical to remove TdA members subject to the Proclamation quickly. These individuals were designated as foreign terrorists. Within Venezuela, TdA was able to grow its numbers from the steady prison population and build its criminal enterprise through the extortion of inmates. Keeping them in ICE custody where they could potentially continue to recruit new TdA members posed a grave risk to ICE personnel; other, nonviolent detainees; and the United

States as a whole. Holding hundreds of members of a designated Foreign Terrorist Organization, where there is an immediate mechanism to remove them, would be irresponsible.

9. While it is true that many of the TdA members removed under the AEA do not have criminal records in the United States, that is because they have only been in the United States for a short period of time. The lack of a criminal record does not indicate they pose a limited threat. In fact, based upon their association with TdA, the lack of specific information about each individual actually highlights the risk they pose. It demonstrates that they are terrorists with regard to whom we lack a complete profile.

10. However, even though many of these TdA members have been in the United States only a short time, some have still managed to commit extremely serious crimes. A review of ICE databases reveals that numerous individuals removed under the AEA have arrests and convictions in the United States for dangerous offenses, including an individual alleged to have committed murder; an individual with pending state charges for aggravated assault with weapon and who was identified by state authorities related to an armed home invasion and kidnapping; an individual with a state arrest for harassment, and indecent assault where he entered the room of a fourteen-year-old victim, tried to lift her shirt, grabbed her thigh, and rubbed his penis on her; an individual who was arrested for fourth-degree grand larceny and resisting arrest who was encountered in a home with other gang members, three automatic rifles, two handguns, and extended magazines; an individual convicted of conspiracy to harbor aliens, in violation of 8 U.S.C. § 1325(a)(1)(A)(v)(I) and (a)(1)(B)(i), involving his role in a stash house—including his job of taking and restricting access to the victims' cell phones—where officers and agents located sixteen individuals in the stash house, including a pregnant female and a fifteen-year-old unaccompanied child; an individual arrested for a misdemeanor sex offense and felony assault;

an individual with a state arrest for second-degree assault, intent to cause injury with weapon/instrument; an individual arrested for second-degree assault with intent to cause serious physical injury in a manner injure child less than seventeen, for which there is an order of protection in the case; an individual arrested at a TdA-run brothel and charged with evading arrest, promoting prostitution, possession of fentanyl, and possession of marijuana; an individual arrested for property damage, assault and simple assault; as well numerous other theft and larceny-related offenses.

11. Additionally, a review of ICE databases reveals that numerous individuals removed have arrests, pending charges, and convictions outside of the United States, including an individual who is under investigation by Venezuelan authorities for the crimes of aggravated homicide, qualified kidnapping, and illegal carrying of weapons of war and short arms with ammunition for organized gang in concealment and trafficking; an individual who is the subject of an active INTERPOL Blue Notice issued on or about January 2, 2025, and a Red Notice issued February 5, 2025, for the crime of kidnapping and rape in Chile; an individual who is the subject of an INTERPOL Red Notice issued by Chile for kidnapping for ransom and criminal conspiracy involving TdA; an individual who admitted he sold marijuana and crystal methamphetamine for the Colombian gang Las Paisas, assaulted someone with a knife for a cellphone while living in Venezuela, and has twice robbed people for money while living in Colombia; an individual who is the subject of an INTERPOL Red Notice for child abduction; an individual identified as a "high-ranking" member of the TdA by the Mobile Tactical Interdiction Unit in Guatemala City, Guatemala; an individual who is the subject of an INTERPOL Red Notice based on obstruction of justice, criminal conspiracy, and aggravated corruption based on the individual's role as a police officer in modifying evidence to cover up a murder; an individual

who, according to Peruvian Newspapers, is associated with high-ranking TdA members and who fled Peru while under investigation for illegal possession of firearm and distributing narcotics; an individual who is the subject of an INTERPOL Blue Notice stating that he is under investigation in Venezuela for murder with aggravating circumstances against a victim whose corpse was found inside a suitcase on a dirt road; and an individual who is the subject of an warrant from Chile for carrying or holding a weapon subject to control.

12. According to a review of ICE databases, numerous individuals removed were arrested together as part of federal gang operations, including two individuals who were in a vehicle during a Federal Bureau of Investigations gun bust with known TdA members; four individuals who were arrested during the execution of an Homeland Security Investigations New York City operation; and four individuals who were encountered during the execution of an arrest warrant targeting TdA gang member, all of whom were in a residence with a firearm and attempted to flee out the back of the residence.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of March 2025.

ROBERT L CERNA II

Digitally signed by ROBERT L CERNA II
Date: 2025.03.17 22:07:01 -05'00'

Robert L. Cerna
Acting Field Office Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.G.G., et al.,

Plaintiff(s),

v.

DONALD J. TRUMP, et al.,

Defendant(s).

Civil Case
No. 25-00766 JEB

Washington, D.C.

March 15, 2025

MOTION HEARING HELD VIA ZOOM
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT CHIEF JUDGE

APPEARANCES:

FOR THE PLAINTIFF(S): Lee Gelernt, Esquire
Daniel A. Galindo, Esquire
American Civil Liberties Union
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18th Floor
New York, New York 10004

Skye Perryman, Esquire
Somil Trivedi, Esquire
Sarah Rich, Esquire
Democracy Forward Foundation
P.O. Box 34533
Washington, D.C. 20043

FOR THE DEFENDANT(S): Drew C. Ensign, Esquire
United States Department of Justice
950 Pennsylvania Avenue Northwest
Washington, D.C. 20530

REPORTED BY: Tammy Nestor, RMR, CRR
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The following proceedings began at 5:00 p.m.:

THE COURTROOM DEPUTY: We are here today for a motion hearing in Civil Action 25-766, JGG, et al. versus President Donald Trump, et al.

Beginning with counsel for the plaintiff, please state your name for the record.

MR. GELERNT: Good afternoon, Your Honor. Lee Gelernt for the plaintiffs from the ACLU.

THE COURT: Good afternoon.

MR. GALINDO: Good afternoon, Your Honor. Daniel Galindo for the plaintiffs from the ACLU.

THE COURT: Thank you.

MS. PERRYMAN: Good afternoon, Your Honor. Skye Perryman for the plaintiffs from Democracy Forward Foundation.

THE COURT: Welcome.

MR. TRIVEDI: Somil Trivedi from the Democracy Forward Foundation for the plaintiffs.

THE COURT: Thank you.

MS. RICH: Good afternoon, Your Honor. Sarah Rich for the plaintiffs, also from Democracy Forward Foundation.

THE COURT: Thank you. Nice to see all of you.

THE COURTROOM DEPUTY: Okay. And defense?

MR. ENSIGN: Good afternoon, Your Honor. Drew Ensign for the federal defendants.

THE COURT: Thanks, Mr. Ensign.

Okay. So first, apologies for my attire. I went away for the weekend and brought with me neither a robe nor tie nor appropriate shirt, so thank you all for being appropriately attired and hope you will forgive my casual ones.

Thanks also for everybody's availability on such short notice. Again, I only learned of this case first thing this morning, and I know everybody has been working hard to get up to speed on it since that time.

So I have a few -- just a couple preliminary points and questions, and then we will move forward.

So the first is I was told first thing this morning that at least one of the named plaintiffs was at that point being placed on a plane or imminently being placed on a plane to be deported, and my ruling this morning was, because I was not aware of the issuance of any proclamation and I don't think one had been issued at the time I ruled, my ruling was based on my belief that under the INA, there was no authority to immediately deport folks who were named plaintiffs.

So my ruling was not a preventive ruling related to the AEA because I didn't believe it had been -- there had been a proclamation at that time. I now see that there has been a proclamation issued.

Mr. Ensign, do you have a time of day that that was issued you can put on the record?

MR. ENSIGN: I do not, Your Honor. We are happy to look into that and get back to you. I know it was just put on the presidential website about an hour ago.

THE COURT: But fair to say this afternoon?

MR. ENSIGN: Your Honor, I don't know the answer to that question.

THE COURT: Okay.

MR. GELERNT: Your Honor, I apologize for interrupting. This is Mr. Gelernt. My understanding from the proclamation is that it was signed yesterday. It may not have been made public until today, but that it was signed and, I guess, kept secret until today.

THE COURT: It's an interesting question of when it is effective if it's not published. Thank you for that. But just making clear that my ruling was INA-based this morning.

Okay. The second question which I think the plaintiffs have raised in alerting my chambers to the proclamation is that they expected planes to be departing within the last couple of hours.

And so I will ask you, Mr. Ensign, if any of the named plaintiffs are, in fact, on any plane that has departed?

MR. ENSIGN: Your Honor, I don't know specifically as to particular planes, but we have confirmed with the clients that these five plaintiffs that are named, the individual named plaintiffs that are a subject of the TRO, will not be removed during the course of that 14 days.

THE COURT: Okay. But then I would assume that means that they are either not on the planes or that they will not be removed from the planes and will be brought back once the planes land in El Salvador. Is that fair?

MR. ENSIGN: Your Honor, I don't know the status of the planes. If there are removal flights, the five would not be on them.

THE COURT: Okay. I'm sorry. Was it not six, Mr. Gelernt?

MR. GELERNT: It was five, Your Honor.

THE COURT: Sorry. Okay. All right. So thank you, Mr. Ensign.

And I also understand just from looking at the docket that the government has appealed my TRO ruling. And that's obviously your right, Mr. Ensign. So I won't go into, because I don't think I have jurisdiction given the appeal, to reargue the TRO ruling, but what we will just look at today is the class question. And then if I do, in fact, certify provisionally, then we can talk.

I think what that would likely mean is that the

plaintiffs could then seek a TRO on behalf of a certified class, and then we can talk about how we want to go from there. I think we are having an echo.

THE COURTROOM DEPUTY: It is. I am having difficulty with the public line. It may be too many people on here. I'll keep it as long as I can, Your Honor.

THE COURT: Okay. Thank you.

So let me ask the government then what your position is regarding the class issue only.

MR. ENSIGN: Your Honor, we oppose class certification. The principal reason is one of venue and authority. Under -- I think we are getting the echo again.

THE COURT: We are, but let's try to go ahead, and as annoying as it is, let's see if we can push through with the echo.

MR. ENSIGN: Thank you, Your Honor. Will do.

These are claims that plaintiffs have brought that fundamentally sound in habeas. When the supreme court considered the last AEA case in Ludecke versus Watkins, 355 U.S. 160, these were all considered within the scope of habeas. And because this is a habeas case, because it sounds in habeas and because plaintiffs have specifically included a habeas claim, I believe it's Count 9 of their complaint, then the venue rules of habeas apply.

Under the supreme court decision in Rumsfeld v.

Padilla, venue was only appropriate for a habeas case solely in the location where the person is being detained or where (unintelligible), and so because of that --

(There was an interruption by the court reporter.)

THE COURT: Sorry, Tammy, the court reporter.

I think when there's an echo, I think you might have to sort of proceed sentence by sentence and pause and let the echo go through and then continue.

And, Tammy, we'll hope that will be satisfactory.

So, Mr. Ensign, again, the issue is venue. You are saying that it must be brought where the warden or the -- typically prisoner cases, it's the warden, but here, whoever is actually detaining the plaintiffs. Is that correct?

MR. ENSIGN: That's correct, Your Honor. In addition, this Court has recognized, and I believe Your Honor in the Vetre versus Sessions case, which is 316 F. Supp. 70, that when habeas is available, then that is an -- that's an adequate alternative remedy that precludes APA claims under Section 702, and so all the claims would have to be considered under habeas.

And because of that, you know, to the extent that there could ever be a class, it could only be solely within a single judicial district of people there. And of course, it would still have to satisfy all the other requirements of classes, but certainly that venue issue precludes this Court

certifying a nationwide class.

THE COURT: Okay. Thank you very much.

Mr. Gelernt, can you respond to the venue question?

MR. GELERNT: Sure, Your Honor. I think initially -- I guess I don't have an echo, so I can continue.

Initially we have -- we think this conflates the merits. And you know, you issued a TRO. You found you had jurisdiction to issue a TRO. So we think that's sufficient at this point. I think we are veering pretty far into the merits.

But just taking it on those terms, for one thing, we filed both a habeas and APA 1331. And you can challenge the Enemy Aliens Act without habeas. There are cases like Clark that do that. But also, for habeas, I would also say that the immediate custodian rule does not apply because this is not core habeas asking for relief. It's to stop the transfer and challenge the constitutionality.

So both because we haven non-habeas fonds of jurisdiction and because the immediate custodian rule doesn't immediately apply in this case, I think that's more than sufficient for this Court to proceed.

THE COURT: So, Mr. Ensign, Mr. Gelernt is right that they are not seeking release, so tell me why you think your venue argument is still appropriate.

MR. ENSIGN: Your Honor, because these claims

inherently sound in habeas. Plaintiffs recognize that themselves by bringing a habeas case. The supreme court itself has recognized that it's appropriate to consider this in habeas when it did so in the Ludecke case.

And where habeas applies, it displaces a lot of other law including specifically the APA, as this court found in the Vetre case. It also displaces even statutory causes of action. You know, Heck v. Humphrey, for example, even though you would otherwise have a 1983 suit for most constitutional claims, the second they sound in habeas, habeas, you know, cuts off 1983 entirely and forces you to go through the route of habeas.

And so the habeas rule has some real teeth and is ultimately an attack on the authority of wardens to turn people over, you know, to be removed, and they would -- I mean, what they are seeking ultimately is the equivalent to telling the immigration, equivalent to a warden, you may not release these people to be removed from the country.

THE COURT: Isn't that the exact opposite of habeas where you just said you are ordering them you may not be released as opposed to habeas which is you must be released, right?

MR. ENSIGN: Your Honor, it is -- in this application, it is a little odd, but certainly the way the supreme court has considered it previously, like,

specifically challenges to the AEA sounded in habeas. And that was an utterly uncontroversial aspect of the Ludecke decision. Even though it was five-four about, you know, the intricacies of the AEA, it nonetheless was uncontroversial there that this was properly heard as a habeas claim.

THE COURT: Do you want to respond to that, Mr. Gelernt?

MR. GELERNT: Your Honor, I would just say that the fact that some cases can be brought in habeas certainly doesn't preclude them being brought under 1331 and the APA and this court. And Your Honor has opinions along those lines with detainees outside of the district in Damus and I think Heredia Mons as well.

As Your Honor said, this is not a core habeas. We certainly can proceed in habeas in this district, but we don't need to proceed in habeas. We are not aware of any case that says we cannot challenge the Alien Enemies Act on non-habeas grounds.

THE COURT: All right. Well, this is obviously an issue that has not been briefed.

I should have said earlier at the beginning of the hearing, although it is implicit, that there is no broadcasting or recording of this hearing, and I am being informed that it is, in fact, being broadcast by a certain individual. That's in violation of the court's rules. That

can be punishable by contempt. You may not broadcast or record any court proceedings. And further -- I am getting further information we will shut down the public line.

THE COURTROOM DEPUTY: Your Honor, I did make that statement.

THE COURT: Thank you.

THE COURTROOM DEPUTY: You're welcome.

THE COURT: So I think it would be very helpful for me to get some expedited briefing on this. And I know that given the circumstances, the plaintiffs are justifiably concerned about imminent deportation.

Can you tell us, Mr. Ensign, are imminent deportations and removals under this proclamation planned? When I say imminent, I mean in the next 24 or 48 hours.

MR. ENSIGN: Your Honor, I don't know the answer to that question. We can certainly investigate that and report that back to you. But I don't know that -- the answer to that. I know what plaintiffs have said to the clerk's office. I don't yet know -- have an ability to confirm that or, you know, contest that.

THE COURT: Okay. So how soon can you get that information?

MR. ENSIGN: Your Honor, I can certainly talk to them ASAP and see. You know, it is Saturday. I will try to get people as quickly as possible and find out that information.

You know, I think we were certainly planning on opposing the TRO by tomorrow night in advance of the hearing on Monday if that's still going forward. We can certainly include it in that filing if that works.

THE COURT: So, Mr. Gelernt, do you want to propose a schedule for me? I think I would like the -- we should probably have the government first respond saying there is -- arguing just on the venue issue of class certification, and then you can respond to that and I would rule quickly.

MR. GELERNT: Your Honor, a couple of things. One is that I recognize it's Saturday, but on the other hand, the government appears to be moving planes very rapidly to El Salvador with hundreds of people. So we hope that in the next five minutes, counsel for the government can get an answer to that.

Our understanding from people on the ground, from different sources, is that planes are going right now taking Venezuelans to El Salvador and may be ending up in a Salvadoran prison. Not only will that divest this Court of jurisdiction, but I think those people are in real trouble, Venezuelans put into a Salvadoran prison.

So we had two flights that we believe were scheduled for this afternoon that may have already taken off or during this hearing, so I think in the next five minutes.

And we would further ask Your Honor that you issue a class-wide TRO pending the briefing, and we will be prepared to get the venue briefing in as soon as the government can do it and you would like. But I think there is so much urgency here and there is so much harm at stake and this Court's jurisdiction is at stake.

And just one clarification, Your Honor, we don't believe we would need to amend the TRO because the TRO did ask for a class-wide TRO. The complaint was a class complaint. We have class papers, and the TRO was seeking a class TRO.

So we would respectfully urge this Court to issue a class TRO now to avoid any more harm and then brief the venue as fast as the government would like. And we would respond in eight hours or so or ten hours or whatever the Court thinks is appropriate.

THE COURT: I think it would probably be helpful if we adjourned this hearing briefly and let Mr. Ensign do some digging and then returned and talked about this further. So why don't we -- can we adjourn this hearing until 6:00 Eastern Time, at which time, Mr. Ensign, I will want to know, have planes, in fact -- is deportation of people under the proclamation pursuant to the AEA in motion now and will it be for the next 48 hours, because that would require a more immediate decision. All right, Mr. Ensign?

MR. ENSIGN: We can do that, Your Honor. I mean, briefly on the irreparable harm point, as the supreme court said in Nken, Although removal is a serious burden for many aliens, it's not categorically irreparable as some courts have said. It is accordingly plain that the burden of removal alone cannot constitute the requisite irreparable injury.

THE COURT: I think they have made out more than just removal. I think they have made out the harm that will befall the individual plaintiffs upon removal.

So what we will do is we will adjourn the hearing until 6:00 p.m. Eastern Time. We will resume the hearing at that point and get information from Mr. Ensign, and then I will also try to have a better sense of whether I am prepared to -- again, it could be issuing a separate TRO covering this provisional class or not.

Okay. Any objection to that, Mr. Gelernt?

MR. GELERNT: No, Your Honor. Thank you.

THE COURT: Good.

Mr. Ensign?

MR. ENSIGN: No, Your Honor. We will proceed as you instruct.

THE COURT: Okay. See everybody in 38 minutes. Thanks.

THE COURTROOM DEPUTY: This honorable court is

adjourned until 6:00 p.m.

(The hearing adjourned at 5:22 p.m.)

THE COURT: Thanks, Nikki.

Welcome back, everybody. I don't think we need to have everyone identify themselves again. I've got the same counsel present.

Mr. Ensign, let's hear your report.

MR. ENSIGN: Your Honor, unfortunately I don't have many details to share. I have talked to the clients who let me know the sort of operational details as to what is going on with raised potential national security issues, particularly ones if discussed with a public line. So I do not have additional details I can provide at this time.

They raised that we may be able to provide Your Honor additional details in an in camera hearing if we were to --

THE COURT: Fine. Maybe what we should do -- Nikki, can we either disconnect the public line, or can you put us in breakout rooms? Can we disconnect and then reconnect the public line, or can we go into a breakout room?

THE COURTROOM DEPUTY: I can just remove the public line right now.

THE COURT: And then can you reinstate it?

THE COURTROOM DEPUTY: I believe so. If it disconnects, I can call it without interrupting as well. It's different than the courtroom.

THE COURT: Okay. So we are going to disconnect the public line for this in camera proceeding, and then we will come back.

(The public line was disconnected.)

THE COURT: Okay. The public line is disconnected.

Mr. Ensign.

MR. ENSIGN: Your Honor, I am still trying to get additional details. I don't -- we would have to sort out what can still be provided in camera. They suggested that as a way to potentially provide some details, but I do not personally have those right now.

THE COURT: So you have no details for us in camera?

MR. ENSIGN: Not at this time, Your Honor. We would have to figure out what could be provided in camera.

THE COURT: Okay. Well, when is that going to be determined?

MR. ENSIGN: I don't know. I have been trying to get those details, and I don't presently know when I would be able to get that. I'm certainly trying to get that information, but that is not something, the details, that I know.

MR. GELERNT: Your Honor, I'm sorry.

THE COURT: Sure. Go ahead.

MR. GELERNT: Your Honor, what we understand is that two flights went to El Salvador this afternoon, one very

recently, and there's another one, we are not sure where it's scheduled to go exactly. It may be Honduras. We are not sure. But it's supposed to leave at 6:23.

THE COURT: All right. Let's reconnect the public line.

THE COURT REPORTER: Your Honor, is the in camera portion of the hearing under seal?

THE COURT: I trust not, Mr. Ensign, since we didn't hear anything. Any reason we need to put that under seal, Mr. Ensign?

MR. ENSIGN: No objection, Your Honor.

THE COURT: Okay. So no, Tammy.

(The public line was reconnected.)

THE COURT: All right. It looks like it's -- is it back up, Nikki?

THE COURTROOM DEPUTY: Yes, Your Honor.

THE COURT: Okay. So for the public, there were no representations that were able to be made in our private session, so the public has not missed anything.

All right. So, Mr. Gelernt, why don't you just repeat your statement.

MR. GELERNT: We understand that two flights went to El Salvador this afternoon; one very recently, and then another flight is scheduled for 6:23, we believe, to Honduras, but we are not entirely sure. And the flight

destinations have changed for these past two flights. But we believe it's scheduled for 6:23, so only in a matter of minutes.

THE COURT: So, Mr. Ensign, you can't -- can you confirm that people -- you can't even confirm -- well, I guess on the public line, you're not -- and actually couldn't make any representations even privately what's happening with any flights.

So let me just go over then a few issues that we discussed earlier. So the first is the people who would be subject to be certified as a class and then further requested TRO, Mr. Gelernt, they are, as you believe, all currently held under INA?

MR. GELERNT: They are all in proceedings as far as we understand, and so what the government apparently is doing is using the Alien Enemies Act to circumvent the immigration laws and to remove them before they actually have a final order. That's the case with the five plaintiffs, and that's what we understand to be happening around the country.

THE COURT: Right, but what I'm trying to look at is the venue and habeas question.

MR. GELERNT: Right.

THE COURT: And so I guess -- it seems that you are not seeking to challenge the fact or duration of their

confinement. Is that true?

MR. GELERNT: That's absolutely right, Your Honor. And I think that's the critical distinction here, that it's not a core habeas challenging release. They are not trying to get out of detention in this lawsuit. They are going to be held in detention presumably unless they have some individual basis under the INA to get out. This lawsuit will not allow them to be released, but it will stop their removal hopefully under the Alien Enemies Act so they can continue their proceedings under the immigration law. So it's absolutely not a core habeas.

THE COURT: So --

MR. GELERNT: I apologize, Your Honor. I was just going to add the point --

THE COURT: Go ahead.

MR. GELERNT: -- even if it could be brought in habeas, that doesn't mean it has to be. So your decision in RILR makes that point, Araceli. There's a number of cases in this district. You made the point very clearly in your IRLR decision that even if it could be brought in habeas, it doesn't have to be.

THE COURT: Mr. Ensign, why do you think then that they are challenging the fact or duration of confinement?

MR. ENSIGN: Your Honor, I think that this sounds in habeas for several reasons. I think one is that because the

AEA vests all its authority, relevant authority, with the president himself and the APA can't be used to challenge presidential actions, the only claims that we are left with here are habeas claims.

We think the supreme court's decision in the 1948 case in Ludecke also indicates that this is a habeas case. And it's ultimately challenging, you know, the exercise of the authority over their person under the AEA in a way that has been recognized to sound in habeas previously.

But on top of all those things, we think that even if wasn't core habeas, it would still be subject to the habeas rule. Notably this court in the Vetre case --

THE COURT: You keep saying this court, and I don't think you mean me. Do you?

MR. ENSIGN: I actually do, Your Honor.

THE COURT: Okay. So the 316 F. Supp. 70?

MR. ENSIGN: Yes. 316 F. Supp. 3d.

THE COURT: Right. So I'm saying that F. Supp. predates my time here. Okay. Sorry. Go ahead.

MR. ENSIGN: I apologize, Your Honor. Of course when I mean the court, I mean the district for the District of Columbia.

THE COURT: Right, which I'm not bound by. So if you will distinguish, I try to do that in my opinions, if you would be so kind.

MR. ENSIGN: Absolutely, Your Honor. In the Vetre case, there were non-core habeas claims including conditions. And in that case, this court recognized, this was in a somewhat odd posture, that within DDC, that because prison condition cases could be brought in habeas, they had to be. And so similarly, because these claims can be brought in habeas, they have to be.

THE COURT: The prison condition cases, again, relate to the nature of confinement and duration of your confinement. And here, they are not arguing that they can't be confined. They are just saying they can't be removed, right?

MR. ENSIGN: Your Honor, we are using it to address whether this is core or non-core. In Vetre, a non-core habeas claim was transferred under the venue rule. So whether this is core habeas, as we have argued, and clearly where the venue rule would apply or even if this were non-core habeas, then nonetheless the venue rule still applies to it as this court has recognized.

MR. GELERNT: Your Honor, I would just say that that case involved, I think you were getting at this, but the length of someone's confinement.

THE COURT: Again, I have not gone back and reviewed that case because your citation earlier, Mr. Ensign, led me to believe it was not my case. I know IRLR is.

I guess your -- do you want to dismiss your habeas claim, Mr. Gelernt? I don't know. It's certainly not your primary claim. You may have other reasons for including it.

MR. GELERNT: Your Honor, I think if the Court felt like it needed us to dismiss the habeas in order to issue a class-wide TRO, then we are prepared to do that. We certainly don't feel like we need it.

On the other hand, I think the Court could just hold it in abeyance. I mean, I think that it's very clear that if you don't need to bring it in habeas, you don't have to and you can bring it -- in other words, I think Your Honor could not have been clearer in IRLR. There are a number of cases that say that. Otherwise, virtually every case would be brought in habeas.

THE COURT: Again, I think this is a reasonably close question, but I've got to rule on it with essentially 40 minutes' notice given that this was first raised by the government in our hearing. And I'm not blaming the government at all because they haven't had an opportunity to brief it.

And so as brief as my research has been at this period of time, I don't think that venue bars certification. I will, for clarity, I will grant the plaintiffs' -- first grant the plaintiffs' motion to dismiss their habeas count. So that count is dismissed without prejudice at this point.

But I do find that class certification is warranted under Federal Rule of Civil Procedure 23(a) and 23(b)(2). So I will certify a class, and the class will be -- let's talk about the definition. The plaintiffs ask for all noncitizens who were, are, or will be subject to the AEA proclamation and its implementation.

So now that we actually have a proclamation that we have been able to review, Mr. Gelernt, is there a reason to modify that class definition?

MR. GELERNT: I think certainly, Your Honor, if you want to insert the name of the proclamation and the date, that would be fine with us, or we could submit it to the Court. But I think, if I'm understanding you correctly, I think that's what you are getting at, and that would make sense.

THE COURT: Or if there's other -- that's one point, but whether there's another modification that you would make.

MR. GELERNT: Yeah.

THE COURT: Go ahead.

MR. GELERNT: I think the other point would be that it seems to be the government's position that they can begin these removals pursuant to the act without publicizing and publicize after the removals have started. So that makes us very concerned that there could be another proclamation

coming tomorrow naming a different gang, MS-13 or some other gang.

So I guess we could start with this one if Your Honor would like to proceed more slowly, but there may be a modification that could say any proclamation that names a non-state actor.

THE COURT: Yeah, I'm just -- I appreciate that. I feel that that's going farther than I would be prepared to go as to deal with a hypothetical --

MR. GELERNT: Right.

THE COURT: -- proclamation.

MR. GELERNT: Understood.

THE COURT: So let me ask you, Mr. Ensign. I know you are objecting to the certification of the class, and this is a provisional certification only, but do you have concerns, if certified, with the wording, and would you propose amendments to that?

MR. ENSIGN: Your Honor, first, just for the record, we do object to the class certification, as you know. I am trying to pull up the specific language right now. Candidly, it's not a question I have given thought to before.

THE COURT: No, I understand. I understand. Everybody here is operating on the fly a bit. I can tell you what the -- I think I wrote the -- the language I wrote

down earlier was all noncitizens who were, are, or will be subject to the AEA proclamation.

I mean, I think -- I don't know why -- Mr. Gelernt, is there a reason we can't simply say all noncitizens who are subject to the proclamation?

MR. GELERNT: I would prefer that we have will be, but I understand if Your Honor thinks that are covers the waterfront.

THE COURT: I think so. So the language would be all noncitizens who are subject to the AEA proclamation, and we will get the specifics, and its implementation.

MR. GELERNT: And so I assume, Your Honor, that would mean that anybody who is designated a week from now, I mean, will be would cover it obviously, assuming it's going to continue designating people, so I assume that's why it is in there.

THE COURT: Yes. Well, when you say designated, you mean for removal?

MR. GELERNT: Well, I think they have to say you are designated. I gather what the government is doing is designating you as someone subject to the Alien Enemies Act, and then they can do whatever they want to them, detain them, remove them. And so that's why the will is in there. But if Your Honor is stating on the record that are would cover anybody who in the future is subject to it --

THE COURT: Yes.

MR. GELERNT: Okay.

THE COURT: Now or in the future is.

MR. GELERNT: Right.

THE COURT: So back to you, Mr. Ensign. Any modification of that?

MR. ENSIGN: No, Your Honor. I mean, no, Your Honor. We don't believe we have a basis to dictate to plaintiffs how they would, you know, define their own class.

THE COURT: Okay.

MR. ENSIGN: But as to the substitution of, you know, the specific proclamation at issue, to make it specific to that, that we don't have objection specifically to that. I would preserve, you know, our objections to -- we focused on venue, but we don't believe the other requirements of class certification have been met here. In particular, for typicality, there may be very different claims as to those that were lawfully admitted to the United States and those who, you know, never had lawful admission.

THE COURT: Okay. I think, again, at this provisional time, and I guess -- what we will say is APA proclamation of March 15, 2025, and we can actually use the specific title which I see based on the text of that.

Okay. So plaintiffs then are also seeking a TRO related to that class. And again, so -- I'll just say a few

things here, that this is obviously a difficult question. My ruling earlier related to the INA. This is difficult for a few reasons. And again, I'm just looking at the likelihood of success on the merits. And under our circuit, the question is is there a serious legal question presented, not is there necessarily a 51 percent chance of prevailing.

And there are really sort of two issues on this. The first is does the political question doctrine or other -- or do other prudential considerations bar judicial scrutiny of the proclamation in the first place, and second, if they do not bar such scrutiny, is the proclamation illegal.

I think that the first question is harder than the second. And again, we have tried to do quick research on a very expedited time frame, and I'm well aware of the president's broad authority to apprehend, restrain, and remove noncitizens deemed alien enemies.

For example, the president has unreviewable authority to determine whether a state of war actually exists, and if so, to remove enemy aliens in the manner he wishes.

So the question is does such authority extend to other determinations within the statute such as invasion or predatory incursion or foreign nation or government. And that, unfortunately, is a question of first impression here.

We certainly looked at some of the cases like Ludecke, L-U-D-E-C-K-E, the 1948 supreme court case, in

addition to Lockington versus Smith from the hoary vintage of 1817, as well as Clark, which is the D.C. Circuit case from 1946, and Von Heyman, H-E-Y-M-A-N, Second Circuit, 1947.

These are difficult questions. There's also a helpful law review by Professor Vladeck, V-L-A-D-E-C-K, from 2007 in the Lewis & Clark Law Review about enemy aliens, enemy property, and access to courts which sets some of these points out as well.

So I guess, Mr. Ensign, maybe you are prepared to deal with this and maybe you are not yet, but tell me why, given the lack of authority regarding the president's -- whether the president's authority extends to his determination of some of those other terms, I should hold that it does.

Again, I know this was going to be a class cert hearing and we are all racing to get up to speed on this, but I will be happy to hear you if you want to discuss that.

MR. ENSIGN: Sure, Your Honor. As you know, there isn't a lot of precedent on this, but what there is, you know, recognizes the quite broad discretion of the president here.

In particular, the Ludecke case arose from a circumstance where a German plaintiff, you know, was still being held under the AEA, who had a facially quite

reasonable claim, you know, that the war has ended, the war has been over for three years, what are you doing still, you know, exercising AEA authority over me.

And the court said quite clearly, like, no, this is left to the discretion of the president, and the president has determined that the war is continuing notwithstanding the fact that they are not -- you know, there is not fighting going on and that, in fact, the E-day was, I believe, more than three years in the rearview mirror at that point.

And so certainly when the supreme court reached this, it recognized the very broad discretion of the president. There's other language in that case towards the tail end of it that I unfortunately don't have at my fingertips but again underscores the extent to which discretion is vested in the president as to these sorts of questions.

THE COURT: Right. But isn't -- and again, read broadly, Ludecke certainly supports you, and certainly even read narrowly, I understand the courts can't question the president's power to remove enemy aliens or even his determination that a state of war continues to exist, but it did seem to accept that courts could hear challenges to the construction and validity of the statute and in that case challenges raising whether the person restrained is, in fact, an enemy alien 14 years of age or older. That's at

page 171, footnote 17.

So read more narrowly, why doesn't it leave open the question that judicial review is available to look at whether certain preconditions have been met for the president to invoke the statute?

MR. ENSIGN: Your Honor, I think the nature of the claims here are ones that are more of the sort that are the political questions. For example, plaintiffs are very much advancing the concept that, you know, war is not something that can be engaged in or, you know, is a concept that has relevance as to subnational actors. I think that is a question that has been reserved for the political branches.

In particular, for example, the Congress in 2001 gave the president authorization of war powers to use against subnational actors such as Al-Qaeda. Here, we have TDA has specifically been designated as a foreign terrorist organization. So you have a recognition that the war powers do extend to this sort of context as to which plaintiffs are advancing a claim.

And so I think that sort of claim that plaintiffs are raising here sounds in that sort of core political question that has been reserved for the political branches.

THE COURT: Mr. Gelernt, do you want to respond to that?

MR. GELERNT: I think Your Honor made the point that

I was going to make. I mean, this is ultimately a separation of powers question. What was going on in Ludecke was whether the war was over, and it was a declared war by Congress, and Congress has not stated that the war was over. I think that's what the supreme court was ultimately saying.

I don't read Ludecke as saying that the preconditions, the statutory preconditions, can't be challenged; otherwise, there would be no end to what the executive branch could do. This is a delegation from Congress. There are very specific terms. And we read Ludecke as saying that the construction of the statute can be challenged and whether someone fits within the proclamation can be challenged. I think Ludecke was ultimately, again, about separation of powers.

THE COURT: And then it would seem that Clark and Von Heyman are better cases for you even though they are -- they precede Ludecke, Mr. Gelernt. Do you agree with that?

MR. GELERNT: Your Honor, I don't want to get ahead of myself. I have not looked back on those cases before this hearing.

THE COURT: Okay.

MR. GELERNT: I think there are certainly additional cases. I was simply responding to Ludecke. But I think there are many other cases that allow -- that challenge the statutory preconditions. I think that's, you know, sort of

fundamental separation of powers law. This is not sort of the president invoking his inherent authority under the constitution. We don't think that he would have the power to do it anyway. But this is the president invoking a specific statutory provision that Congress has laid out very clear guidelines, and I think it would be fundamentally inconsistent with separation of powers for this Court not to be able to review whether those preconditions were met.

THE COURT: Let me ask you, in looking at the language of the proclamation, why on the merits, if I got to it and found it's not a political question, why don't you think, Mr. Gelernt, that the proclamation suffices to say that TDA is part of the Venezuelan government that is involved in an invasion or predatory incursion?

MR. GELERNT: Well, Your Honor, I think the government -- I think the proclamation doesn't even go as far as actually stating that TDA is a foreign government. And the language is pretty clear in the statute that you need a foreign government. As Your Honor knows, the statute has only been invoked three times in the history of the country and always during a declared war, the War of --

THE COURT: Let me interrupt. So it says that, and I'm reading from the proclamation, Venezuelan national and local authorities have ceded ever greater control over their territories to transnational criminal organizations

including TDA. The result is a hybrid criminal state that is perpetrating an invasion of and predatory incursion into the United States.

So why don't you think that's a foreign nation?

MR. GELERNT: Well, I think there's a lot of law, and we will be prepared to reply to the government's submission at the TRO and talk more about it at the TRO on the merits, but I think there is a lot of law about what constitutes a foreign government. And I don't think the United States recognizes TDA as a foreign government. They recognize Venezuela as a foreign government. I think that's the historic understanding of the statute.

We also would take issue with the fact that we think the Court certainly can review whether immigration constitutes some kind of invasion. You know, it may be that the Court can't second-guess how much of an invasion a foreign government is making, that that may be a matter of degree, but certainly that sort of threshold legal question about whether immigration constitutes an invasion is something the Court can rule on. And we know of no historical precedent that would suggest that straight migration or noncitizens coming and committing crimes constitutes an invasion within the meaning of the statute or the constitution.

THE COURT: Mr. Ensign, do you want to respond to

that?

MR. ENSIGN: Certainly. A few things, Your Honor. I think first, they are trying to draw a distinction between the statutory preconditions at issue here from Ludecke, but it was statutory preconditions in both cases. Whether or not there's, in fact, a war was very much the issue in Ludecke. That is one of the statutory conditions. They are challenging others. But it's -- they are all part of the same statutory preconditions, you know, framework, are they met or not. And the Court just straight up deferred to the president in circumstances where a lot of people would think there was not a war.

I guess two other things I would say. One is that this -- I think this discussion very much illustrates why additional briefing would be desirable to resolve this.

THE COURT: No, no, absolutely. I couldn't agree with you more. But the question is what do we do in the interim, right? No, I want further briefing from both sides. I want to look at this longer. This is not easy. These are not easy issues. And I appreciate everyone's diligence on such short notice. But the question in a case like this is why shouldn't a TRO issue to maintain the status quo on difficult issues while you folks figure it out.

In other words, maybe there's some national security

or other concerns that you have that you haven't raised yet because you haven't learned of them yet that you could tell me and I would hear, but right now it seems that the status quo is keeping these folks in ICE custody but not deporting them. And I'm not sure what the prejudice to the government is from such a determination.

I mean, tell me if I'm -- to the extent you can say anything that's not national security to respond to that.

MR. ENSIGN: Your Honor, I think two responses. The first is that much of plaintiffs' irreparable harm arguments were predicated on the premise that this Court would somehow lose jurisdiction if people were not -- I mean, not in D.C., but in the United States. I think that was more a question of habeas. Now that we are past habeas and we are really just talking about APA, I don't understand why this Court would necessarily lose jurisdiction.

THE COURT: If they are deported?

MR. ENSIGN: And I think second is how Nken looks at it as irreparable harm where --

THE COURT: I think the argument -- the argument, excuse me for interrupting and I will let you respond, but the argument in part is these folks are going to be sent to Salvadoran or Honduran prisons, which were not going to be terribly receptive to Venezuelans, particularly whom you have labeled TDA, and so not only are they going to be

deported, but it's not going to be to a friendly countryside, but to prisons. So why isn't -- don't you think that's irreparable?

MR. ENSIGN: Your Honor, I don't think that's been established by their filings. More generally, I would just point out that this cuts to the core of the president's Article II powers. And so interfering with that, you know, both in the -- both in the -- this goes to foreign powers -- or foreign policy. This goes to war powers. This goes to immigration. These are core Article III -- or sorry, Article II areas that -- I mean, this would cut very deeply into the prerogatives of the executive, and for that basis, we think the balance of harms are tipped sharply in our direction.

THE COURT: So, Mr. Gelernt, do you want to respond to the irreparable harm issue?

MR. GELERNT: Yes, Your Honor, a few things. One is I think the Court would lose jurisdiction because it wouldn't be able to offer a remedy.

THE COURT: Right. Sure. I mean, once they are out of the country, I'm not sure what I can do there.

MR. GELERNT: Right. So you clearly would lose jurisdiction. I think that alone is critical.

The other point is that this is just not straight removal, as Your Honor has pointed out. They may be sent to

El Salvador. It seems like many of them already have been sent to El Salvador. They are in real danger, I can't express that strongly enough, if they end up in a Salvadoran prison. But even if they end up back in Venezuela, many of them, all of our plaintiffs and many of them, will have asylum claims, and they have been tagged now as the worst of the worst by the president, and so they will be in real danger in Venezuela.

Now, ultimately some of them may lose their asylum claims in the U.S., but they are entitled, we believe, to finishing that, and the Aliens Enemy Act can't circumvent that point.

And the government keeps bringing up the Nken case. Nken was very clear that the court was not going to lose jurisdiction in that petition for review, that particular petition for review, but also that if there was harm like torture or persecution, then that would be irreparable harm. The court was just making the simple point that not every deportation involves irreparable harm. They could be removed to the UK, and there may not be irreparable harm.

So I think this goes far beyond the normal type of irreparable harm. And even in removal cases, of course, this Court often stays things while it figures it out. These are individuals who are in detention, so it's not as if they are roaming around. I think for the government to

say that the delay in doing this is irreparable --

THE COURT: Let me ask you, Mr. Gelernt, let me just interrupt you for a second. I think there was a little bit of confusion or uncertainty in your response earlier on this point. Is it fair that -- I think you equivocated a little bit, and I'm not saying that in a negative way, on whether all of the potential class was actually held by -- was actually currently in custody in the United States. Do you know the answer to that?

MR. GELERNT: We believe that everyone right now who is going to be put on flights is in custody. I don't know that the proclamation limits it to that, but I think --

THE COURT: So let me ask you. So what if the class were narrowed to all noncitizens in United States custody?

MR. GELERNT: Right. I think two points about that. One is that would solve the immediate problem of them being put on planes, because if they are not in detention, they can't be put on planes.

But the other point, I think, in terms of irreparable harm is obviously the government remains free to arrest them if they've committed an immigration violation or a criminal violation and put them in detention. And as Your Honor pointed out earlier, we are not seeking their release from U.S. facilities. So we are not in any way saying that the government needs to allow them to continue roaming the

streets. But if Your Honor feels like at this stage issuing a TRO for the class of individuals who are currently in detention or will be imminently put in detention, I think that would work given that we are all moving very quickly and I know Your Honor is trying to figure this out on the fly.

THE COURT: So back to you, Mr. Ensign. In terms of -- so harm to the United States by a TRO of short duration regarding only people who are already in detention so they can't cause any harm within the United States and enjoin their removal from the United States, what's the harm to the government by such a status quo TRO?

MR. ENSIGN: I mean, I think it cuts to the core of the president's authority over critical areas that have been assigned to them, that war powers, immigration, you know, conducting foreign policy, like, those are harms of, you know, significant sorts.

This is where you have an express statutory authorization, so this is a Youngstown Steel, you know, category 1 type case in our perspective. So we certainly think there are very substantial harms.

I mean, you know, certainly we object to any TRO. Our preference would obviously be a narrower one if there is one, but we believe that any TRO impermissibly and unconstitutionally infringes upon the prerogatives of the

president, no more so here than it would have been for the supreme court in Ludecke to tell the president, you know what, you're wrong, World War II is over.

THE COURT: Right. And that sort of is the justiciability argument, not the balance of the equities argument, right?

MR. ENSIGN: No, Your Honor. I think it sounds in both. Certainly you see it more frequently in that context, and usually where it applies, you will never get to irreparable harm because it's not justiciable. But those sorts of harms to the executive have been recognized, you know, certainly as to anything that enjoins an act of Congress. Maryland versus King recognizes that's irreparable harm.

The same principle applies to, you know, the injunction against the president exercising his powers both inherent in Article II and those given to him by statute such as the AEA.

THE COURT: All right. Any response to that, Mr. Gelernt?

MR. GELERNT: No, Your Honor. I think I --

THE COURT: Right.

MR. GELERNT: I apologize. I just wanted two housekeeping things, but I will do that after you finish, Your Honor.

THE COURT: Okay. I am prepared to rule. Again, I think these are hard questions, close questions, and particularly hard questions on the expedited time frame that we are talking about here. But I believe that the plaintiffs have sufficiently made out and satisfied the TRO factors.

I think the hardest remains the likelihood of success on the merits because of the justiciability question. But at this point, they have certainly presented a serious question that this is justiciable because it's outside of what Ludecke talked about, and that once it is justiciable, I think they have certainly presented a serious question that the president's proclamation is not legal under the AEA, or a different way of saying it is that the AEA does not provide a basis for the president's proclamation given that the terms invasion, predatory incursion really relate to hostile acts perpetrated by enemy nations and commensurate to war.

Also the terms nation and government do not apply to non-state actors like criminal gangs. And the statute doesn't refer in my interpretation to unauthorized presence of individuals here including individuals who have entered illegally.

And so as a result, I don't think the AEA provides a basis for removal under this proclamation.

I think on the other three factors, the plaintiffs have an easier time. I think there's clearly irreparable harm here given that these folks will be deported and many or a vast majority to prisons in other countries or even back to Venezuela where they face persecution or worse.

Again, based on the record that I have, balance of the equities, I think is reasonably straightforward inasmuch as a brief delay in their removal does not cause the government harm, and I haven't heard any harm from the government beyond general infringement on presidential powers which, again, I don't take lightly, but I think that's more of an issue that relates to the justiciability than it does to the balance of the equities. And again, the public interest in a case like this runs with the factors I have already mentioned.

So I find that a TRO is appropriate for the class members, and it would be to prevent the removal of the class for 14 days or until further order of the Court. And the class will be all noncitizens in U.S. custody who are subject to the proclamation of March 15, 2025 and its implementation.

And I will issue a minute order memorializing this so you don't have to race to write it down.

So we need to talk about where we go from here because I want to revisit this after some more briefing.

And again, these are hard questions, and I may end up coming out the other way on some of them after I have had more time to think about them and hear from both sides. But what I am tasked to do today is to make the best ruling I can under the law and the circumstances.

And particularly given the plaintiffs' information unrebutted by the government that flights are actively departing and plan to depart, I do not believe that I am able to wait any longer and that I am required to act immediately, which I have done so.

So, Mr. Ensign, the first point is that I -- that you shall inform your clients of this immediately, and that any plane containing these folks that is going to take off or is in the air needs to be returned to the United States, but those people need to be returned to the United States. However that's accomplished, whether turning around a plane or not embarking anyone on the plane or those people covered by this on the plane, I leave to you. But this is something that you need to make sure is complied with immediately.

We need to set briefing and hearing schedules. Otherwise, Mr. Gelernt, did your housekeeping matters relate to those or something else?

MR. GELERNT: No, they didn't, Your Honor.

THE COURT: So do you want to raise those now?

MR. GELERNT: Oh, they were very, very small. One is

that of the two flights I mentioned that took off this afternoon, I had said that both went to El Salvador. We are now hearing that maybe only one went to El Salvador, and one may have gone to Honduras. I just wanted to correct the record.

THE COURT: Again, just so we are clear, if planes have already landed and discharged their occupants, aside from the five plaintiffs I enjoined earlier, then this order -- I don't have jurisdiction to require their return.

MR. GELERNT: Right. And the other thing was also very small. It's just we would just -- if Your Honor is going to use March 15 as the date, just to say that it was published on the 15th, but we do think it was a March 14 order because that's when it was signed by the president.

THE COURT: Well, I will be sure to cite the title so there won't be any confusion.

MR. GELERNT: Thank you, Your Honor.

THE COURT: Okay. So, Mr. Ensign, I want to hear from you since you are now the party being restrained what you would like to do in terms of briefing and hearing. I had set a hearing for Monday. Given what's now happened, that's not in stone, so what would you like?

MR. ENSIGN: Your Honor, offhand, I think we would be prepared to file a brief Monday night. We could potentially do so earlier, but in particular, many of the people subject

to this order, many, most, or all of them are incredibly dangerous individuals, and so we would like to be able to develop that as appropriate to --

THE COURT: No, given -- let me just say, as I said, you are the one being restrained, so I will give you as much time as you want because you are the one now who's being disadvantaged, so it's your motive to expedite.

MR. ENSIGN: Thank you, Your Honor. Could we tentatively set, you know, Monday night, and then we will inform the Court if we think we need additional time, and then we would ask that the plaintiffs' response be on a similarly expedited basis given that the government is now under a TRO.

THE COURT: Okay. So March 17, and that will give you until midnight for the government's opposition, and so this will be, again, to their -- I guess your brief then would be to -- I think your brief would be to vacate the TRO, which, as opposed to an opposition to their request, it should be, I think, to vacate the TRO.

And then the government can -- I'm sorry, the plaintiffs then, I will give you the same amount of time, 48 hours till the end of March -- till March 19 to oppose.

And then for a hearing, we could do Friday, the 21st. Again, because I will need time to review this myself, could we do 2:00 or 2:30 on the 21st, Mr. Gelernt? And this,

again, can be by Zoom.

MR. GELERNT: 2:30 works in person or Zoom, Your Honor.

THE COURT: Mr. Ensign?

MR. ENSIGN: That should work for us, Your Honor.

THE COURT: Okay. I will say 2:30.

So I'm vacating the March 17 hearing. It will be March 21 at 2:30.

Okay. So I will issue a minute order memorializing all of this. And again, it will be -- Mr. Ensign, it's going to be to vacate the current TRO, because the other TRO is on appeal, so it won't be obviously the reason -- well, the reason is somewhat different because now the proclamation has been filed. But I do not have jurisdiction to act on the prior TRO, so this would be for the current TRO.

MR. ENSIGN: Understood, Your Honor. And one point related to that if I might.

THE COURT: Sure.

MR. ENSIGN: Would this TRO apply to aliens that otherwise have final orders of removal, because from our perspective, that would be an independent basis to effectuate their removal.

THE COURT: Right.

MR. ENSIGN: And the 1252 jurisdictional bars on this

Court would also apply if --

THE COURT: Right. Yes. No, I think that that's fair.

I would think not, Mr. Gelernt.

MR. GELERNT: Your Honor, if they are not removing someone based on the Alien Enemies Act but based on some other authority, it wouldn't fall within this jurisdiction.

THE COURT: Right. So yes, Mr. Ensign, I agree.

MR. ENSIGN: Okay.

THE COURT: Anything else, Mr. Gelernt?

MR. GELERNT: No, Your Honor.

THE COURT: Mr. Ensign?

MR. ENSIGN: No, Your Honor.

THE COURT: All right. Again, thanks, everyone, for your diligent work. I will issue the order, and we will see you on Friday. Thank you.

MR. GELERNT: Thank you, Your Honor.

MR. ENSIGN: Thank you, Your Honor.

(The hearing concluded at 6:53 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

3/16/25

s/ Tammy Nestor
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13033

Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 10903 of March 14, 2025

Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua

By the President of the United States of America

A Proclamation

Tren de Aragua (TdA) is a designated Foreign Terrorist Organization with thousands of members, many of whom have unlawfully infiltrated the United States and are conducting irregular warfare and undertaking hostile actions against the United States. TdA operates in conjunction with Cártel de los Soles, the Nicolas Maduro regime-sponsored, narco-terrorism enterprise based in Venezuela, and commits brutal crimes, including murders, kidnappings, extortions, and human, drug, and weapons trafficking. TdA has engaged in and continues to engage in mass illegal migration to the United States to further its objectives of harming United States citizens, undermining public safety, and supporting the Maduro regime's goal of destabilizing democratic nations in the Americas, including the United States.

TdA is closely aligned with, and indeed has infiltrated, the Maduro regime, including its military and law enforcement apparatus. TdA grew significantly while Tareck El Aissami served as governor of Aragua between 2012 and 2017. In 2017, El Aissami was appointed as Vice President of Venezuela. Soon thereafter, the United States Department of the Treasury designated El Aissami as a Specially Designated Narcotics Trafficker under the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. 1901 *et seq.* El Aissami is currently a United States fugitive facing charges arising from his violations of United States sanctions triggered by his Department of the Treasury designation.

Like El Aissami, Nicolas Maduro, who claims to act as Venezuela's President and asserts control over the security forces and other authorities in Venezuela, also maintains close ties to regime-sponsored narco-terrorists. Maduro leads the regime-sponsored enterprise Cártel de los Soles, which coordinates with and relies on TdA and other organizations to carry out its objective of using illegal narcotics as a weapon to ''flood'' the United States. In 2020, Maduro and other regime members were charged with narcoterrorism and other crimes in connection with this plot against America.

Over the years, Venezuelan national and local authorities have ceded ever-greater control over their territories to transnational criminal organizations, including TdA. The result is a hybrid criminal state that is perpetrating an invasion of and predatory incursion into the United States, and which poses a substantial danger to the United States. Indeed, in December 2024, INTERPOL Washington confirmed: ''Tren de Aragua has emerged as a significant threat to the United States as it infiltrates migration flows from Venezuela.'' Evidence irrefutably demonstrates that TdA has invaded the United States and continues to invade, attempt to invade, and threaten to invade the country; perpetrated irregular warfare within the country; and used drug trafficking as a weapon against our citizens.

Based upon a review of TdA's activities, and in consultation with the Attorney General and the Secretary of the Treasury, on February 20, 2025, acting pursuant to the authority in 8 U.S.C. 1189, the Secretary of State designated TdA as a Foreign Terrorist Organization.

As President of the United States and Commander in Chief, it is my solemn duty to protect the American people from the devastating effects of this invasion. NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including the Alien Enemies Act, 50 U.S.C. 21 *et seq.,* hereby proclaim and direct as follows:

Section 1. I find and declare that TdA is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States. TdA is undertaking hostile actions and conducting irregular warfare against the territory of the United States both directly and at the direction, clandestine or otherwise, of the Maduro regime in Venezuela. I make these findings using the full extent of my authority to conduct the Nation's foreign affairs under the Constitution. Based on these findings, and by the authority vested in me by the Constitution and the laws of the United States of America, including 50 U.S.C. 21, I proclaim that all Venezuelan citizens 14 years of age or older who are members of TdA, are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies. I further find and declare that all such members of TdA are, by virtue of their membership in that organization, chargeable with actual hostility against the United States and are therefore ineligible for the benefits of 50 U.S.C. 22. I further find and declare that all such members of TdA are a danger to the public peace or safety of the United States.

Sec. 2. I direct the Attorney General, within 60 days of the date of this proclamation, to prepare and publish a letter under her signature declaring the policy described in section 1 of this proclamation as the policy of the United States and attaching this proclamation. I direct the Attorney General to transmit this letter to the Chief Justice of the United States, the chief judge of every circuit court of appeals, the chief judge of every district and territorial court of the United States, each Governor of a State and territory of the United States, and the highest-ranking judicial officer of each State and territory of the United States.

Sec. 3. I direct that all Alien Enemies described in section 1 of this proclamation are subject to immediate apprehension, detention, and removal, and further that they shall not be permitted residence in the United States.

Sec. 4. Pursuant to the Alien Enemies Act, the Attorney General and the Secretary of Homeland Security shall, consistent with applicable law, apprehend, restrain, secure, and remove every Alien Enemy described in section 1 of this proclamation. The Secretary of Homeland Security retains discretion to apprehend and remove any Alien Enemy under any separate authority.

Sec. 5. All executive departments and agencies (agencies) shall collaborate with law enforcement officials of the United States and with appropriate State, local, and tribal officials, to use all lawful means to apprehend, restrain, secure, and remove Alien Enemies described in section 1 of this proclamation.

Sec. 6. Pursuant to my authority under 50 U.S.C. 21 to direct the conduct to be observed on the part of the United States toward the Alien Enemies subject to this proclamation, to direct the manner and degree of the restraint to which such Alien Enemies shall be subject and in what cases, to provide for the removal of such Alien Enemies, and to establish any other regulations which are found necessary ''in the premises and for the public safety,'' I hereby direct the Attorney General and the Secretary of Homeland Security to execute all the regulations hereinafter contained regarding the Alien Enemies described in section 1 of this proclamation. The Attorney General and the Secretary of Homeland Security are further directed to cause the apprehension, detention, and removal of all members of TdA who otherwise qualify as Alien Enemies under section 1 of this proclamation. The Attorney General and the Secretary of Homeland Security are authorized to take

all necessary actions under the Alien Enemies Act to effectuate this proclamation, consistent with applicable law. In doing so, and for such purpose, they are authorized to utilize agents, agencies, and officers of the United States Government and of the several States, territories, dependencies, and municipalities thereof and of the District of Columbia. All such agents, agencies, and officers are hereby granted full authority for all acts done by them in the execution of such regulations when acting by direction of the Attorney General or the Secretary of Homeland Security, as the case may be.

Pursuant to the authority vested in me by the Constitution and the laws of the United States of America, including the Alien Enemies Act, 50 U.S.C. 21 *et seq.,* I hereby declare and establish the following regulations which I find necessary ''in the premises and for the public safety'':

(a) No Alien Enemy described in section 1 of this proclamation shall enter, attempt to enter, or be found within any territory subject to the jurisdiction of the United States. Any such Alien Enemy who enters, attempts to enter, or is found within such territory shall be immediately apprehended and detained until removed from the United States. All such Alien Enemies, wherever found within any territory subject to the jurisdiction of the United States, are subject to summary apprehension.

(b) Alien Enemies apprehended pursuant to this proclamation shall be subject to detention until removed from the United States in such place of detention as may be directed by the officers responsible for the execution of these regulations.

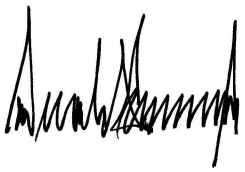
(c) Alien Enemies shall be subject to removal to any such location as may be directed by the officers responsible for the execution of these regulations consistent with applicable law.

(d) All property in the possession of, or traceable to, an Alien Enemy, which is used, intended to be used, or is commonly used to perpetrate the hostile activity and irregular warfare of TdA, along with evidence of such hostile activity and irregular warfare, shall be subject to seizure and forfeiture.

The Attorney General is further granted authority, pursuant to the Alien Enemies Act and 3 U.S.C. 301, in consultation with the Secretary of Homeland Security, to issue any guidance necessary to effectuate the prompt apprehension, detention, and removal of all Alien Enemies described in section 1 of this proclamation. Any such guidance shall be effective immediately upon issuance by the Attorney General.

This proclamation and the directives and regulations prescribed herein shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of March, in the year of our Lord two thousand twenty-five, and of the Independence of the United States of America the two hundred and forty-ninth.



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