No. 24A931

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Applicants,

v.

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

Respondents.

ON APPLICATION TO VACATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION TO APPLICATION TO VACATE AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION

The government has not satisfied its exceedingly high burden to warrant the extraordinary relief it seeks: vacating unappealable Temporary Restraining Orders ("TROs") that merely preserve the status quo while a pending preliminary injunction motion is decided on an expedited basis (with a hearing on April 8). The TRO does not order anyone's release, nor does it prevent the government from carrying out regular removals under the Immigration and Nationality Act ("INA"). Indeed, the government has apparently been removing individuals it contends are members of the Tren de Aragua gang, using regular immigration procedures, since the TRO went into effect. *See* Sec'y of State Marco Rubio, X (Mar. 31, 2025, 8:25 AM ET), https://perma.cc/CE6C-ZMDM. Under the circumstances, the court of appeals correctly concluded that the government will suffer no irreparable harm in the short term. In contrast, without the TRO, Plaintiffs will suffer extraordinary and irreparable harms—being sent out of the United States to a notorious Salvadoran prison, where they will remain incommunicado, potentially for the rest of their lives, without having had *any* opportunity to contest their designation as gang members. *See* App. 27a–28a (Henderson, J., concurring) ("The Executive's burdens are comparatively modest compared to the plaintiffs'."); *id.* at 68a–70a (Millett, J., concurring) ("the injury to the Plaintiffs is great and truly irreparable"); *id.* at 129a–130a (Boasberg, J.) (plaintiffs face "a high likelihood of suffering significant harm").

The government cannot explain why the equities are in its favor, particularly since it (now) concedes that individuals *are* entitled to contest their designation (which is all the district court has thus far held). It argues only that this case should have been brought in habeas, and disputes whether venue is proper in the District of Columbia. But these questions—habeas or Administrative Procedure Act; Texas or D.C.—are procedural issues more appropriately decided

by the lower courts in the first instance, and not by this Court in the context of a stay, at the TRO stage.

Equally to the point, because the government acknowledges that review is proper *somewhere*, its dire claims about the TRO amounting to intolerable judicial interference with national security reduce, at best, to technical venue disputes, which it will have ample opportunities to air in the district court.

On the merits, the government is also unlikely to prevail, because it cannot satisfy the plain text of the statute it is invoking. The use of the Alien Enemies Act ("AEA") during peacetime against a criminal gang is unprecedented and fails to satisfy the Act's statutory predicates: that there be a "declared war" with a "foreign nation or government" or an ongoing or threatened "invasion or predatory incursion" by a "foreign nation or government" against the "territory of the United States," thereby allowing the President to detain and remove that nation's "natives, citizens, denizens, or subjects." 50 U.S.C. § 21. As Judge Henderson emphasized below, the Act was meant solely to address "military" hostilities directed at the United States, not criminal activity by a gang during peacetime. App. 17a–22a; *id.* at 23a–24a ("Like [invasion], predatory incursion referred to a form of hostilities against the United States by another nation state, a form of attack short of war. Migration alone did not suffice."). The AEA has been invoked only three times in the country's history, all in the context of declared wars: the War of 1812, World War I, and World War II. The President's effort to shoehorn a criminal gang into the AEA, on a migration-equals-invasion theory, is completely at odds with the limited delegation of wartime authority Congress chose to give him through the statute.

Perhaps because the district court did not reach the question of whether the Proclamation satisfied the AEA's statutory predicates or violated other congressional enactments (such as the Convention Against Torture), the government does not discuss the merits at length, instead arguing that there can be no judicial review of those questions. But Judge Henderson explained that the courts must be able to review whether the AEA's statutory predicates have been satisfied. App. 11a–17a (Henderson, J., concurring). And all three circuit judges below agree that individuals at least must have an opportunity to contest their designation under the AEA. *See id.* at 72a (Walker, J., dissenting). The government likewise concedes that whatever judicial review may exist to determine if the Proclamation satisfies the statutory predicates for the AEA, individuals at least have a right to contest whether they have been mistakenly designated as members of the Tren de Aragua gang. App. 17–25, 38 ("the government agrees that respondents *are* permitted judicial review under the AEA").

Indeed, the government must make that concession because the Court's principal AEA case, *Ludecke v. Watkins*, unequivocally stated that individuals are entitled to review of whether they fall within the statute's sweep. *See* 335 U.S. 160, 171 & nn. 8, 17 (1948). Indeed, during World War II, individuals were provided time to contest their designations and courts routinely reviewed whether designated individuals fell within AEA orders. *Id.* at 163. More broadly, *Ludecke* twice emphasized that the "construction and validity" of the Act were justiciable, and, in fact, decided a statutory question—whether the term "declared war" was synonymous with the existence of "actual hostilities"—on the *merits*. *Id.* at 170–71.

The government nonetheless urges this Court to vacate the TRO on the ground that habeas in the district of confinement is the exclusive means for raising all challenges to the

Proclamation. But, as already noted, Plaintiffs' claims need not be brought in habeas. App. 9a–10a (Henderson, J., concurring); 62a–64a (Millett, J., concurring); *see also* App. 106a–111a (Boasberg, J.). Moreover, as even the limited TRO record below demonstrates, the theoretical avenue for relief through habeas will be a practical impossibility for most class members. App. 70a. The government has already hurried hundreds of individuals onto planes to El Salvador without providing advance notice, let alone an opportunity to contest their deportation. The document individuals may have been asked to sign before being staged for removal expressly stated that "no hearing, appeal, or judicial review" was permitted regarding their designation. Resp.App. 302a. In fact, the government began staging noncitizens for removal under the AEA even before the Proclamation was posted on the White House website, notwithstanding the AEA's requirement that the President make a "public proclamation." 50 U.S.C. § 21; *see also* App. 99a–100a. It continues to take the position that it need not provide notice to individuals whom it has designated as falling within the Proclamation, much less provide time to file habeas petitions. App. 40a, 70a. And when asked pointedly in the court of appeals whether it plans to load more individuals onto planes without notice the minute the TRO is dissolved, the government did not hesitate to take that position. App. 32a (Millett, J., concurring). Given these representations, the district court's TRO is the only thing preventing Defendants from invoking the AEA to send individuals to a prison in El Salvador, perhaps never to be seen again, without any kind of procedural protection, much less judicial review.

The Government reportedly has already sent more than 130 Venezuelan men to El Salvador, including some whom it seemingly sent in violation of the district court's March 15 order. Resp.App. 105a. They have been confined, incommunicado, in one of most brutal prisons

in the world, where torture and other human rights abuses are rampant. And were there any doubt about how these men will be treated, the Salvadoran President released a video, re-posted by President Trump and Secretary Rubio, showing them being brutalized immediately upon departing U.S. aircraft. *See* Nayib Bukele, X (Mar. 16, 2025, 8:13 AM ET), https://x.com/nayibbukele/status/1901245427216978290 [https://perma.cc/52PT-DWMR].[1] The Salvadoran President has stated, moreover, that the men may remain imprisoned there for the remainder of their lives, without access to the outside world. Resp.App. 109a. And it is becoming increasingly clear that many (perhaps most) of the men were not actually members of Tren de Aragua, and were instead erroneously designated as such in large part because of their tattoos, a wholly unreliable means of identifying membership in that particular gang. Resp.App. 271a. The TRO is thus essential to ensure that more individuals who have no affiliation with the gang will not be sent to a notorious foreign prison.

The implications of the government's interpretation and execution of the AEA are staggering. Virtually every religious and ethnic group in this country has at one time or another been associated with a criminal organization—Irish, Jews, Italians, Russians, and so on. The Court should deny the government's extraordinary request to vacate a TRO that would allow the government to immediately begin whisking away anyone else it unilaterally declares to be a member of a criminal gang to a brutal foreign prison.

[1] The President has also sarcastically referred to the prison "becom[ing] so recently famous for such lovely conditions." *See* Donald J. Trump, Truth Social (Mar. 21, 2025, 7:43 AM ET), https://perma.cc/678L-RTRY.

STATEMENT

The AEA is a wartime authority that grants the President specific powers with respect to the regulation, detention, and removal of enemy aliens. App. 2a–4a. Passed in 1798 in anticipation of a war with France, the AEA, as codified today, 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. The Act further provides that a noncitizen subject to such a proclamation who "is not chargeable with actual hostility, or other crime against the public safety, . . . *shall* be allowed" at least a "reasonable time" to settle his affairs. 50 U.S.C. § 22 (emphasis added).

A. Procedural Background

On March 14, 2025, the President signed a Proclamation under the AEA declaring that Tren de Aragua ("TdA"), a Venezuelan criminal gang, is "perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States." App. 177a. The Proclamation provides that "all Venezuelan citizens 14 years of age or older who are members of TdA . . . are liable to be apprehended, restrained, secured, and removed as Alien Enemies." *Id.* Although the statute calls for a "public publication," 50 U.S.C. § 21, the administration did not actually publish the Proclamation until 3:53pm EDT on March 15, thus precluding any orderly challenge. *See* Resp.App. 9a, 449a ¶ 5; App. 100a.

The Proclamation does not provide *any* process for individuals to show they are not affiliated with TdA and instead authorizes the *summary* removal of Venezuelan nationals based only on the government's allegation, bypassing federal immigration statutes, including the right to seek protection from persecution and torture, and other forms of relief. *See* App. 176a–179a.

Early in the morning on March 15, Plaintiffs filed a class action complaint and request for a TRO, alleging that the invocation of the AEA violated the express terms of the statute, unlawfully disregarded immigration processes in the Immigration and Nationality Act ("INA") and violated due process. Resp.App. 7a, 31a. That morning, the district court entered a TRO prohibiting Defendants from removing the named Plaintiffs pending a hearing. *Id.* at 1a. In the afternoon and early evening of March 15, the district court held a lengthy hearing and provisionally certified a class consisting of "[a]ll noncitizens in U.S. custody who are subject to the March 15, 2025, Presidential Proclamation . . . and its implementation." *Id.* at 2a. The district court also issued a new TRO prohibiting Defendants for fourteen days from removing members of the class pursuant to the AEA Proclamation, but permitting removals under the standard immigration laws. *Id.* The district court set a briefing schedule for Defendants' motion to vacate the TRO and set a hearing for March 21. *Id.* After briefing and oral argument, the district court denied the motion to vacate on March 24. App. 96a. The court held that, prior to removal under the Proclamation, Plaintiffs were entitled to contest their designation as alien enemies. *Id.* at 116a–123a. A few days later, the district court granted Plaintiffs' motion to extend the TROs for another fourteen days to allow the court time to consider Plaintiffs' motion for a preliminary injunction, Resp.App. 4a, which Plaintiffs filed on March 28, *id.* at 190a. The district court scheduled a preliminary injunction hearing for April 8. *Id.* at 3a.

In the interim, the government sought appellate review of the district court's initial March 15 TROs as well as an emergency stay to vacate the TROs. *Id.* at 169a. On March 24, the D.C. Circuit heard oral argument and two days later denied the government's motion for a stay, in a per curiam opinion. App. 1a–93a. Judge Henderson, concurring, found that the orders were appealable but that Defendants had failed to establish a likelihood of success on the merits. *Id.* at 2a–30a (Henderson, J., concurring). Specifically, Judge Henderson stated, in her preliminary view, that the AEA's statutory predicates of "invasion" and "predatory incursion" "referred to a form of hostilities against the United States by another nation state, a form of attack short of war. Migration alone did not suffice." *Id.* at 22a–23a; *see also id.* at 22a ("[I]nvasion is a military affair, not one of migration.").

Judge Millett, also concurring, wrote that the order was not appealable; that, if the court were to reach the merits, Defendants were unlikely to prevail on their jurisdictional argument; and that the balance of equities weighed against Defendants. *Id.* at 31a–71a. Judge Millett explained that "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." *Id.* at 38a–39a (Millett, J., concurring). Judge Millett additionally noted that "[t]he 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." *Id.* at 40a (Millett, J., concurring).

Judge Walker dissented. He acknowledged that Plaintiffs had a right to contest their designation as enemy aliens under the Proclamation but contended that those claims must be brought in habeas in the district of confinement. *Id.* at 72a–93a (Walker, J., dissenting).

B. Factual Background

Defendants' actions have been shrouded in secrecy. The five named Plaintiffs received no advance notice of the basis for their removal. Resp.App. 201a–202a. Nor were they ever given paperwork or informed that they were headed to El Salvador. *Id.* While available information suggests that Defendants may use a notice form that individuals are asked to sign, it asserts that they are "not entitled to a hearing, appeal, or judicial review of this notice and warrant of apprehension and removal," *Id.* at 302a.

By the time the President issued the public proclamation on the afternoon of March 15, the named Plaintiffs and other class members had been shackled and driven to an airport. Resp.App. 104a–105a. The five named plaintiffs were ultimately returned to an ICE detention center in accordance with the district court's TRO on the morning of March 15. *Id.* at 105a. But the remaining class members on the planes were summarily removed and taken to El Salvador's notorious Terrorism Confinement Center (CECOT), a prison in which they remain, and from which it appears no one has ever been released. *Id.* at 108a–109a; *see generally id.* at 248a (describing "harsh and life threatening" conditions in El Salvador's prisons); *id.* at 260a (same).[2]

[2] Class members were turned over to Salvadoran authorities after the district court issued its oral and written TRO orders to return the individuals to the United States. App. 103a–104a. The district court is still investigating the circumstances but what is clear is that at least two planes carrying 137 class members removed under the AEA landed in El Salvador and that U.S. authorities turned them over to Salvadoran authorities well after the district court's March 15 oral and written orders. Resp.App. 201a.

Because the government secretly rushed the men out of the country and has provided Plaintiffs with no information about the class, it remains to be seen whether most (or perhaps virtually all) of the class members are not in fact members of TdA. But evidence since the March 15 flights increasingly shows that many of the individuals removed to El Salvador are not members of TdA. *See id.* at 202a–204a (describing evidence of noncitizens with no ties to TdA summarily removed); *see also id.* at 309a–447a. The government itself has also admitted many individuals removed do not have criminal records in the United States. *Id.* at 95a ¶ 9. One was actually Nicaraguan, not Venezuelan; he was eventually returned to the United States after Salvadoran authorities informed the U.S. of his citizenship status, alongside eight Venezuelan women after the Salvadoran authorities informed the U.S. that the Salvadoran prison would not accept women. *Id.* at 201a.

The process that the government uses to designate individuals as members of TdA is barebones. Officials apply a points-based system that assigns values to various putative indicators of gang involvement, with weight given to tattoos, hand gestures, and social media activity. *Id.* at 299a–300a. A score of eight points generally results in an automatic designation as an "alien enemy," triggering eligibility for removal under the AEA. *Id.* at 298a. A score of six or seven requires supervisor approval to do so. *Id.*

Experts note, however, that TdA does not use consistent symbols or tattoos to identify membership, and that characteristics identified in the system are common in Venezuelan culture and do not reliably indicate gang affiliation. *Id.* at 271a–272a, 280a, 443a. For instance, among the five named plaintiffs, four have tattoos with no known connection to TdA, and the fifth has no tattoos at all. *Id.* at 206a. Experts further describe TdA as a fragmented and decentralized group

with no clear leadership structure or formal ties to the Venezuelan government, and reports indicate no evidence of coordinated activity by TdA in the United States. *Id.* at 269a–271a, 273a, 279a–280a, 289a–290a, 433a.

ARGUMENT

An applicant seeking an administrative stay or summary vacatur of a TRO 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). Summary disposition is "unusual under any circumstances." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990). It is "bitter medicine," *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting), "usually reserved for cases where 'the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error,'" *Pavan v. Smith*, 582 U.S. 563, 567–68 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).

I. THE STAY SHOULD BE DENIED BECAUSE THE TRO IS NOT AN APPEALABLE ORDER AND THE GOVERNMENT IS NOT HARMED BY IT.

The TRO is not appealable, which is reason alone to deny the stay application. The "general rule is that orders granting, refusing, modifying, or dissolving temporary restraining orders are not appealable." 16 Wright & Miller, *Fed. Prac. & Proc.* § 3922.1 (3d ed. 2024). The rule allows trial courts to "preserve the relative positions of the parties" in the face of irreparable harm, and avoids the courts having to act in "haste," granting provisional relief "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Here, the TRO does just that. To ensure the government could not whisk more class members away to a Salvadoran prison before their rights could be at least preliminarily adjudicated, the district court issued a Saturday night minute order that lasts for only a short and finite period pending a hearing on Plaintiffs' preliminary injunction motion, does not conclusively resolve the issues, and does not pretermit any party's ability to air procedural and merits issues in the future. In fact, the Court has scheduled a hearing for April 8 on Plaintiffs' preliminary injunction motions, and given every indication that it will move expeditiously in resolving that motion. App. 155a; Resp.App. 3a.

The government has not cited any case where this Court has vacated a time-limited TRO, let alone one that merely preserves the status quo (including the Plaintiffs' ongoing detention in U.S. custody). In *Sampson v. Murray*, the district court entered a TRO that was set to last until a particular government official appeared before the court to testify. 415 U.S. 61, 86-87 (1974). The government declined to produce the official, raising the specter that the TRO was "potentially unlimited." *Id.* at 85, 87 (injunction "in no way limited in time"). That TRO had been in place for *years* when the case reached this Court. *Id.* at 67 n.8. And *Abbott v. Perez* is not even about TROs. 585 U.S. 579 (2018). There, a three-judge district court issued orders that amounted to an indefinite prohibition on the use of Texas's preferred districting maps after a full trial. *Id.* at 594. The Court thus held that the orders were appealable injunctions under 28 U.S.C. § 1253. *Id.*; *cf.* 28 U.S.C. § 1253 (permitting direct appeal from order of three-judge district court "granting or denying . . . an interlocutory or permanent injunction").

Here, the district court's order merely preserves the status quo as it existed before the Proclamation. The government claims irreparable harm in the form of *potentially* stymied

negotiations; but on the government's concession that Plaintiffs could proceed with habeas petitions, any litigation would entail those same harms (if they exist). The TRO also does not bar the government from prosecuting any alleged gang member for a criminal offense, require anyone's release from immigration detention, or restrain the government from removing individuals under the INA, including under provisions covering removal of terrorists. Resp.App. 2a; *see also* 8 U.S.C. § 1182(a)(3)(B) (specialized Alien Terrorist Removal Court).[3]

II. DEFENDANTS FAIL TO ESTABLISH IRREPARABLE HARM AND THE REMAINING EQUITABLE FACTORS WEIGH HEAVILY IN PLAINTIFFS' FAVOR.

Defendants fail to satisfy their burden on irreparable harm. As both Judges Henderson and Millett properly concluded, the government has not identified any credible claim to irreparable harm that would result from retaining the status quo while the district court expeditiously resolves the preliminary injunction, particularly because the TRO does not order the release of any class member or preclude their removal under the immigration laws. In contrast, the TRO ensures that, based on an unprecedented peacetime invocation of the AEA, additional individuals are not hurried off to a brutal foreign prison, potentially for the rest of their lives, without judicial process.

Defendants misinterpret the D.C. Circuit's opinions with respect to harm to Defendants. App. 14–15. Judge Henderson observed that 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 7a. But for purposes of jurisdiction, Judge Henderson assumed the

[3] The government also argues that it was not required to first request a stay from the district court because it was "impracticable" and "futile." App. 34 n.4. But, as Judge Millett noted, the government had more than a week to do so. *Id.* at 52a.

government's position was true. *Id.* When it came to the irreparable harm prong, however, both Judge Henderson and Judge Millett concluded that the government's purported harm was far too vague and speculative. *See id.* at 26a (Henderson, J., concurring) ("Equity will not act 'against something merely feared as liable to occur at some indefinite time."); *id.* at 50a–51a (Millett, J., concurring) ("the government has shown no such harm here, and its own arguments weigh against it"; "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."); *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.").

Defendants attempt to show irreparable harm by relying on conclusory, untested allegations about Plaintiffs being dangerous gang members—while failing to account for the fact that existing authorities permit Defendants to lawfully detain and remove any truly dangerous individuals, authority the temporary restraining order does not touch. *See e.g.*, 8 U.S.C. §§ 1158(b)(2)(A)(ii)-(iii) (noncitizens barred from asylum if convicted of particularly serious crime or if there are "serious reasons for believing" they "committed a serious nonpolitical crime" outside the U.S.); *id.* § 1231(b)(3)(B)(ii)-(iii) (same for withholding); *see also id.* §§ 1226(c), 1231(a)(6). Defendants' assertions of harm are further belied by the scope of the District Court's order which applies only to individuals already in custody. Plaintiffs were already in secure custody before the President invoked the AEA and Defendants have offered only conclusory statements—rebutted by testimony from the former Assistant Director of ICE—that keeping them in custody while the district court does its work poses a risk to national security. *Compare*

Resp.App. 94a–95a, *with id.* at 453a; *see also supra* (delay caused by TRO is same as delay caused by habeas petitions, which government concedes are allowed).

Failing to demonstrate any credible claim to harm, Defendants instead rely on broad assertions that "[a]lthough removal is a serious burden for many aliens, it is not categorically irreparable." App. 39 (quoting *Nken v. Holder*, 556 U.S. at 435). But in *Nken*, the lack of irreparable injury from removal was predicated on the noncitizen being able to return. *Id.* at 436 (2009) (noting noncitizens "may continue to pursue a petition for review, and . . . relief by facilitation of their return, along with restoration of the immigration status"). Here, however, the government has taken the position that the judiciary loses authority once an aircraft departs. Resp.App. 457a. As the district court properly noted, these AEA removals to El Salvador are hardly the run-of-the-mine deportations.

In short, Defendants offer no serious argument that Plaintiffs will not face grave harm. *Cf.* Resp.App. 248a–258a, 260a–265a (explaining the brutality and torture that routinely occurs in El Salvador's prison).

III. DEFENDANTS ARE WRONG TO ASSERT THAT PLAINTIFFS' CLAIMS MUST BE BROUGHT EXCLUSIVELY THROUGH HABEAS PETITIONS IN TEXAS.

Defendants' chief arguments in favor of stay boil down to disputes about whether Plaintiffs' claims should be brought through habeas corpus or the APA and equity, and in which district. This Court should not wade into those technical venue and procedural issues on an application to stay a TRO. And, in any event, Defendants are wrong in asserting that Plaintiffs'

claims, which do not seek release from detention, may only be brought through habeas petitions in Texas.[4]

This Court has long held that only "core" habeas claims—that is, claims seeking release from custody—must be brought exclusively in habeas. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 117 (2020); *see also Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (the Court has never "recognized habeas as the sole remedy . . . where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody'") (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring)). But Plaintiffs are not seeking their release from custody and claims that do not fall within the "core" of the writ need not be brought exclusively through habeas corpus; the full array of statutory and constitutional vehicles remain available to vindicate non-core rights. App. 64a–65a; *id.* at 63a (Millett, J., concurring) ("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") (quoting *Thuraissigiam*, 591 U.S. at 117).[5]

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[4] Plaintiffs originally included a habeas count with their complaint and only dismissed it without prejudice to allow the district court to move expeditiously in light of the exigent circumstances. App. 169a.

[5] Notably, it was the government who argued in *Thuraissigiam* that the type of claim raised by Plaintiffs here falls outside the "historical core" of the writ, because it seeks to block a transfer rather than obtain release: "[R]espondent seeks to invoke habeas both to protect a purported interest (the ability to seek admission to the United States) and to pursue a type of remedy (additional proceedings concerning relief or protection from removal) that would have been unknown at the time of the Founding." Br. for the United States at 35, *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020) (No. 19-161), 2019 WL 6727092. This Court adopted that position, holding that respondent's requested "relief might fit an injunction or writ of mandamus" because he "does not want 'simple release' but, ultimately, the opportunity to remain lawfully in the United States." *Thuraissigiam*, 591 U.S. at 118–19.

The common law defines those "core" claims that require vindication through habeas: (1) "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody," and (2) "the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *Dotson*, 544 U.S. at 79 (similar); *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (similar). Any challenge to "the fact or duration of [the individual's] confinement" gets to the "core of habeas corpus" and not only *must* be pursued through a habeas petition, *Preiser*, 411 U.S. at 489–90, but also generally in the district of confinement, *see Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004), though there are exceptions to whether it must be brought in the district of confinement, *id.* at 542 U.S. at 433–36 & n.9, 449–50 & n.18. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 495 (1973).

Here, Plaintiffs' claims fall well outside the "core" of habeas corpus, because "[s]uccess . . . does not mean immediate release from confinement or a shorter stay in prison." *Dotson*, 544 U.S. at 82; *compare Preiser*, 411 U.S. at 487 (challenge to deprivation of good-time credits had to be brought in habeas because it sought injunctive relief leading to immediate release), *with Wolff v. McDonnell*, 418 U.S. 539, 554 (1974) (distinguishing *Preiser* because plaintiff sought declaratory judgment about good-time credits, not restoration of those credits, and thus success would not require release), *and Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (where plaintiff sought monetary damages and not release from custody, habeas was not exclusive remedy). Regardless of the outcome of this case, Plaintiffs will remain in ICE custody, and thus habeas corpus is not the exclusive remedy for Plaintiffs' claims. And the immediate custodian rule likewise does not apply to claims that fall outside the core of habeas. *See Padilla*, 542 U.S. at 444–45; *Davis v. U.S. Sent'g Comm'n*, 716 F.3d 660, 666 (D.C. Cir. 2013); *see also* Ilya Somin, *Lee*

Kovarsky on the Venue Issue in the Alien Enemies Act Case, Reason (Mar. 30, 2025), https://perma.cc/26B9-ZAW2 (explaining why Plaintiffs' AEA challenges in this case need not be brought in habeas).[6]

Detained noncitizens have consistently been allowed to raise various APA, statutory, and constitutional claims, even concurrently with habeas. *See Reno v. Flores*, 507 U.S. 292, 299–301 (1993); *Jean v. Nelson*, 472 U.S. 846, 849–50 (1985); *Nielsen v. Preap*, 586 U.S. 392, 401 (2019); *Jennings v. Rodriguez*, 583 U.S. 281, 324 (2018) (Thomas, J., concurring in part) (complaint seeking injunctive and corresponding declaratory relief in the form of bond hearings for class "looks nothing like a typical writ. It is not styled in the form of a conditional or unconditional release order."); *see also, e.g.*, *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 726 (D.C. Cir. 2022); *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 120 F.4th 606, 614 (9th Cir. 2024).[7]

The government's citations all ignore this key distinction between core habeas claims, which *must* be brought in habeas, and claims falling outside that core, which need not be. The government points to *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), but it does not help because *Kiyemba*, like the Court in *Munaf*, recognized only that core claims seeking release must be brought in habeas. 561 F.3d at 513. And *Munaf* held only that a non-core claim seeking to bar an overseas transfer (but not obtain release) *could* be brought in habeas, 553 U.S. at 693,

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[6] The government's reliance on *Boudin v. Thomas*, 732 F.2d 1107 (2d Cir. 1984), a case that neither binds this Court nor the district court currently adjudicating Plaintiffs' claims, is inapt, as the court relied on a question left open in *Preiser* to hold that a challenge to conditions of confinement was in substance a habeas petition. *Id.* at 1111. That has no relevance here where Plaintiffs are not asking for transfer to a better detention center or release.

[7] *Franklin v. Massachusetts*, 505 U.S. 788 (1992), is irrelevant as Plaintiffs are no longer seeking to enjoin the President. Resp.App. 213a n.7. The President is, however, a proper defendant because, at a minimum, Plaintiffs may obtain declaratory relief against him. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 499 (1969).

but failed on the merits, *id.* at 705. The government sought to rely on *Munaf* below, Oral Arg. at 47:08-49:22, but now unsuccessfully tries to distinguish it. As Judge Millett noted, Plaintiffs are like those in *Thuraissigiam* and *Munaf* because they "do not seek release from detention; they want to stay in detention in the United States." App. 64a (Millett, J., concurring).

And while the government places great weight on the fact that *Ludecke* was a habeas case, App. 19, nothing in *Ludecke* or any other case states that an AEA challenge *must* be brought in habeas. In fact, although the government relies in other parts of its brief on *Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946), App. 19, it fails to acknowledge that *Citizens Protective League* was itself not brought in habeas. *Citizens Protective League*, 155 F.2d at 291–92 (addressing three separate "civil actions" on behalf of a nonprofit and 159 detained German nationals seeking "injunction, mandatory injunction and ancillary relief"); *see also Citizens Protective League v. Byrnes*, 64 F. Supp. 233, 233 (D.D.C. 1946) (AEA case not in habeas). As the district court observed, the fact that most prior AEA cases were brought in habeas is "largely a relic of historical happenstance," as the AEA has not been invoked since World War II. App. 106a.

Insofar as the government suggests that a special habeas rule should exist for the AEA, it has pointed to no statutory text that would preclude review of Plaintiffs' challenges under the APA. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 141 (1967) (requiring clear and convincing evidence of congressional intent); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 49–52 (1955) (APA's "generous review" provisions applied in immigration challenges); *Brownell v. We Shung*, 352 U.S. 180, 181 (1956) (habeas and APA both available); *Robbins v. Reagan*, 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.").[8]

Nor does the government cite any statute that displaces the district court's equity jurisdiction to issue a TRO to preserve the status quo and its ability to hear the parties in an orderly fashion. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."); *see also Trump v. Hawaii*, 585 U.S. 667, 675–76 (2018); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).

The government relies heavily on *LoBue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996), but *LoBue* was an extradition case. *Id.* at 1082. Extradition historically has had its own specialized body of law and "extension of the APA to *extradition* orders is impossible" as extradition is carried out by *courts*, which are not agencies for purposes of the APA. *Id.* at 1083 (citing *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986) (Friendly, J.)). Additionally, *LoBue* rested on the unique circumstances in which the plaintiffs, in addition to their declaratory judgment action in D.C., also had a separate pending habeas petition in their district of confinement that *did* seek their release. *Id.* at 1082. The Court thus noted that because success in plaintiffs' declaratory suit would have "preclusive effect" on their pending habeas petition, it would secure release from

[8] While certain types of challenges to individual immigration removal orders under the INA have been channeled into the petitions for review process following the INA of 1961, APA review remains available where not specifically precluded by statute. *See Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 16–17 (2020) ("The APA establishes a 'basic presumption of judicial review [for] one suffering legal wrong because of agency action.'") (quoting *Abbott Lab'ys*, 387 U.S. at 140).

confinement, thereby precluding the availability of other remedies. *Id.* at 1083–84 (citing *Chatman-Bey v. Thornburgh*, 864 F.2d 804 (D.C. Cir. 1988), and *Preiser*, 411 U.S. at 489–90).[9]

The government's reliance on Section 704 of the APA is also misplaced. Section 704 displaces APA review only where Congress has "provided special and adequate review procedures" for "reviewing a particular agency's action," and thus designated an "adequate remedy." *Bowen v. Massachusetts*, 487 U.S. 879, 903–04 (1988); *see also id.* at 904 ("A restrictive interpretation of § 704 would unquestionably . . . 'run counter to . . . the [APA.]") (quoting *Pedreiro*, 349 U.S. at 51). Here, the government has completely failed to provide a process for review of designations under the AEA and, as set forth above, *supra*, individuals subjected to AEA removal have no practical ability to seek relief through habeas in any event—meaning it is neither special nor adequate under the circumstances.

In short, Plaintiffs are not seeking release from detention but rather an order prohibiting the federal government from removing them without complying with the limits of the AEA, INA and due process. Their claims can properly be brought under the APA and in equity.

IV. DEFENDANTS ARE NOT SUBSTANTIALLY LIKELY TO PREVAIL ON THE MERITS.

A. Plaintiffs' Claims Are Justiciable.

Defendants vaguely contest that Plaintiffs' claims are subject to judicial review. App. 4 (asserting AEA cases are "barely amenable" to review); *id.* at 19 (asserting without explanation

[9] The Tenth Circuit's unpublished decision in *O'Banion v. Matevousian*, 835 F. App'x 347 (10th Cir. 2020), is inapplicable as it rests on the idea that challenges to the prison's application of the Inmate Financial Responsibility Program to regulate restitution payment schedules are effectively an attack on the execution of the prisoner's sentence, and hence, must be raised in habeas. *See Stern v. Fed. Bureau of Prisons*, 601 F. Supp. 2d 303, 305 (D.D.C. 2009) (discussing cases).

that statutory review is "narrow"). But they do not, and cannot, say that no review is available. As noted, Defendants ultimately concede that, at a minimum, Plaintiffs can contest whether they in fact fall within the Proclamation. Insofar as Defendants contend that the courts may not review Plaintiffs' statutory claims that the Proclamation fails to satisfy the AEA's predicates or is inconsistent with other congressional enactments, they are incorrect.[10]

Plaintiffs raise three principal statutory arguments: (1) the AEA's use of "invasion" and "predatory incursion" refer only to military action in the context of an actual or imminent war; (2) a criminal gang is not a "foreign government or nation"; (3) even if the AEA applies, it still requires compliance with the INA and other later-enacted, more specific statutory protections for noncitizens, especially those seeking humanitarian protections, as well as an opportunity to show that one does not fall under the Proclamation. Under both AEA case law and subsequent developments in political question doctrine, courts can and must review each of Plaintiffs' claims.

Defendants rely almost exclusively on *Ludecke* to cabin the scope of judicial review. App. 4, 18–19, 21, 24.[11] But in addition to recognizing that review of whether an individual falls within the relevant category of "enemy alien"—namely whether the person "'is in fact an alien enemy fourteen years of age or older," *Ludecke*, 335 U.S. at 171 n.17, *Ludecke* twice emphasized that "resort to the courts" *was* available "to challenge the construction and validity of the

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[10] The government has not been clear throughout the litigation whether they believe Plaintiffs' due process claims are justiciable. *Compare* Resp.App. 144a, *with* App. 21.

[11] The government selectively quotes from a law review article to assert that habeas review is only available to determine whether a noncitizen is covered under the AEA, when in fact that article notes that "courts can review whether war has been declared" and "[r]eview extends to 'the construction and validity of the statute.'" Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens,* 98 Colum. L. Rev. 961, 994 (1998) (quoting *Ludecke*, 335 U.S. at 171).

statute," explicitly noting that the AEA does not preclude judicial review of "questions of interpretation and constitutionality." 335 U.S. at 163, 171. Those questions—the "construction" and "interpretation" of the AEA—are precisely what are at issue here.

In *Ludecke* itself, the Court reached the merits of the statutory question presented there: whether a "declared war" no longer existed within the meaning of the Act when "actual hostilities" had ceased (the "shooting war" had ended). *Id.* at 166–71. Only after concluding, on the merits, that the statutory term "declared war" did not mean "actual hostilities," but instead referred to the point at which the President and Congress chose to declare the war over. did the Court state that its review had come to an end. *Id.* at 170 & n.15. In fact, four years later, the Court reversed a government World War II removal decision because "[t]he statutory power of the Attorney General to remove petitioner as an enemy alien ended wh[en] Congress terminated the war." *U.S. ex rel. Jaegeler v. Carusi*, 342 U.S. 347, 348 (1952); *see generally Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (emphasizing that courts can and should decide statutory questions even where they implicate foreign affairs).[12]

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[12] Consistent with *Ludecke*'s recognition that questions about the "construction and validity" of the AEA are justiciable, 335 U.S. at 171, lower courts have reviewed a range of issues concerning the AEA's statutory prerequisites. *See, e.g.*, *U.S. ex rel. Kessler v. Watkins*, 163 F.2d 140, 143 (2d Cir. 1947) (interpreting the meaning of "foreign nation or government"); *U.S. ex rel. Zdunic v. Uhl*, 137 F.2d 858, 860–61 (2d Cir. 1943) ("[t]he meaning of [native, citizen, denizen, or subject] as used in the statute . . . presents a question of law"; interpreting meaning of "denizen" and remanding for hearing on disputed facts); *U.S. ex rel. Gregoire v. Watkins*, 164 F.2d 137, 138 (2d Cir. 1947) (interpreting the meaning of "native"; discussing alternatives to attain a "logically consistent construction of the statute"); *U.S. ex rel. D'Esquiva v. Uhl*, 137 F.2d 903, 905–07 (2d Cir. 1943) (interpreting the meaning of "native" and reviewing executive branch's position on legal status of Austria); *U.S. ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 903 (2d Cir. 1943) (interpreting the meaning of "citizen" and legal effects of Germany's annexation of Austria); *Bauer v. Watkins*, 171 F.2d 492, 493 (2d Cir. 1948) (holding that the government bears the burden of proof of establishing the citizenship of "alien enemy"); *Citizens Protective League*, 155 F.2d at 292, 295 (reviewing whether Proclamation was within "the precise terms"

B. Defendants Are Not Substantially Likely to Prevail on Their Interpretation of the Statute.

Defendants do not seriously address the factor of likelihood of success on the statutory merits claims, likely because the district court did not reach them and only issued the TRO to preserve the status quo until the issues can be litigated on a fuller, preliminary-injunction record. That is all the more reason for this Court to permit the lower courts to address the statutory interpretation questions in the first instance, rather than short circuiting the appeals process by taking the extraordinary step of vacating a TRO. In any event, Defendants are not substantially likely to prevail on their merits argument that the Proclamation satisfies the terms of the AEA.

The AEA has only ever been invoked in times of declared war. Defendants now seek to invoke this limited wartime authority to execute summary removals wholly untethered to any actual or imminent war or to the specific conditions Congress placed in the statute. When the government asserts "an unheralded power" in a "long-extant statute," courts "greet its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). That skepticism is well warranted here.

First, as Judge Henderson explained on a preliminary view of the merits, App. 17a–24a, there is no "invasion" or "predatory incursion" upon the United States. Starting with

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of the AEA, and whether AEA was impliedly repealed); *U.S. ex rel. Von Heymann v. Watkins*, 159 F.2d 650, 653 (2d Cir. 1947) (interpreting "within the United States"; requiring executive branch to show that the petitioner "refuse[d] or neglect[ed] to depart" under Section 21); *U.S. ex rel. Ludwig v. Watkins*, 164 F.2d 456, 457 (2d Cir. 1947) (interpreting "refuse or neglect to depart" in Section 21 as creating a "right of voluntary departure" that functions as a "statutory condition precedent" to the government's right to deport enemy aliens); *U.S. ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116, 117–18 (2d Cir. 1949) (interpreting "reasonable time" to depart under Section 22).

contemporaneous dictionary definitions, as Judge Henderson did below, *id.* at 17a–18a, it is clear that Congress understood those terms to mean a military intrusion into the territory of the United States. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) ("We start where we always do: with the text of the statute."); *see also* Webster's Dictionary, Invasion (1828) (underscoring that "invasion" is "particularly, the entrance of a hostile army into a country for purpose of conquest or plunder, or the attack of a military force"); Johnson's Dictionary, *Invasion* (1773) ("invasion" is a "[h]ostile entrance upon the right or possession of another; hostile encroachment" such as when "William the Conqueror invaded England"); Webster's Dictionary, *Predatory* (1828) ("predatory" underscores that the purpose of a military party's "incursion" was "plundering" or "pillaging"); Johnson's Dictionary, *Incursion* (1773) ("[a]ttack" or "[i]nvasion without conquest").

Other contemporary founding era usages of the terms are in accord. The Founders frequently used both "invasion" and "predatory incursion" in the military sense. *See, e.g.*, Letter from Timothy Pickering to Alexander Hamilton (June 9, 1798) (reporting that "predatory incursions of the French" might result in "great destruction of property" but that militia could repel them);[13] Letter from George Washington to Thomas Jefferson (Feb. 6, 1781) (describing a British raid that destroyed military supplies and infrastructure in Richmond as a "predatory incursion");[14] Letter from George Washington to Nathanael Greene (Jan. 29, 1783) ("predatory incursions" by the British could be managed with limited cavalry troops);[15] John Jay, Con't Cong., Draft of an Address of the Convention of the Representatives of the State of New York to Their

[13] https://perma.cc/H2UY-XTTK.
[14] https://perma.cc/6UBY-6PRB.
[15] https://perma.cc/TY8Y-MTMA.

Constituents (Dec. 23, 1776) (describing the goal of British invasion as "the conquest of America").[16] Courts did the same. *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1, 11 (1805) ("predatory incursions" by Native American nation led to "an Indian war"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831) ("incursions" by Native American nations led to retaliatory "war of extermination"); *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"). And in every instance that the term "invasion" or "invade" appears in the Constitution, it is used in the military sense. *See* U.S. Const., art. I, § 8 (enumerated Congressional powers); *id.*, art. I, § 9, cl. 2 (Suspension Clause); *id.*, art. I, § 10, cl.3 (Invasion Clause); *id.*, art. IV, § 4 (Guarantee Clause).

Reaching for a contrary example, Defendants cite a 1945 case from a district court in Texas. App. at 32 (citing *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181, 189–90 (S.D. Tex. 1945)). But that case uses the term "predatory incursion" to describe military actions by a sovereign nation, Mexico, into Texas. *Amaya*, 62 F. Supp. at 189–90. Defendants offer not a single example of these terms being used in a *non*-military sense.

The interpretive canon of *noscitur a sociis* confirms Plaintiffs' interpretation. That canon "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015) (internal quotation marks omitted). Courts thus look to "[t]he words immediately surrounding" the language to be interpreted to ascertain the "more precise content" of that language. *Id.* (internal quotation marks omitted). Accordingly, in this case, "invasion" and

[16] https://perma.cc/K4SX-4KYB.

"predatory incursion" should be read in light of the immediately neighboring term, "declared war." *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Doing so highlights the express military nature of their usage here—they are more specific than just any hostile entrance. *Cf.* Office of Legislative Affairs, Proposed Amendment to AEA, at 2 n.1 (Aug. 27, 1980)) (AEA contemplates use by the President only "in situations where war is imminent").

Indeed, the same Congress that passed the AEA also passed another law with strikingly similar statutory bounds. In response to concerns about impending war with France, the 1798 Congress authorized the President to raise troops "in the event of a declaration of war against the United States, or of an actual invasion of their territory, by a foreign power, or of imminent danger of such invasion." Act of May 28, 1798, ch. 47, 1 Stat. 558. This language, which "bears more than a passing resemblance to the language of the AEA," App. 20a, makes plain that Congress was concerned about military incursions by the armed forces of a foreign nation.

Employing the whole-text canon leads to the same conclusion. *See Mont v. United States*, 587 U.S. 514, 524 (2019) (citing Antonin Scalia & Bryan Garner, Reading Law 167 (2012) ("whole-text canon" requires consideration of "the entire text")). The AEA requires that the predicate invasion or predatory incursion be "against the territory of the United States." 50 U.S.C. § 21. And at the time of founding, actions "against the territory of the United States" were expressly understood to be military in nature. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 131 (1807) (describing levying war against the United States as "a military enterprize [sic] . . . 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").

If any doubt were left about the military nature of the terms, the historical context dispels it. *See Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 602 U.S. 268, 279 (2024) (considering the "historical context" of statute for purposes of interpretation). At the time of passage, the United States was preparing for possible war with France and already under attack in naval skirmishes. French ships were already attacking U.S. merchant ships in United States waters. *See, e.g.*, 7 Annals of Cong. 58 (May 1797) (promoting creation of a Navy to "diminish the probability of . . . predatory incursions" by France while recognizing that distance from Europe lessened the chance of "invasion"). Congress worried that these attacks against the territory of the United States were the precursor to all-out war with France. This "predatory violence" by a sovereign nation led, in part, to the AEA. *See* Act of July 7, 1798, ch. 67, 1 Stat. 578, 578 ("[W]hereas, under authority of the French government, there is yet pursued against the United States, a system of predatory violence").

Under the statutory text, canons of construction, and historical context, then, "invasion" or "predatory incursion" are military actions by foreign governments that constitute or imminently precede acts of war. "Mass illegal migration" or criminal activities, as described in the Proclamation, plainly do not fall within the statutory boundaries. On its face, the Proclamation makes no findings that TdA is acting as an army or military force. Nor does the Proclamation assert that TdA is acting with an intent to gain a territorial foothold in the United States for military purposes. And the Proclamation makes no suggestion that the United States will imminently be at war with Venezuela. The oblique references to the TdA's ongoing "irregular warfare" within the United States do not suffice because the Proclamation makes clear that it refers to "mass illegal migration" and "crimes"—neither of which constitute war within the

founding era understanding. The Proclamation asserts that TdA "commits brutal crimes" with the goal of "harming United States citizens, undermining public safety, and . . . destabilizing democratic nations." But these actions are simply not "against the territory" of the United States. Indeed, if mass migration or criminal activities by some members of a particular nationality could qualify as an "invasion," then virtually any group, hailing from virtually any country, could be deemed enemy aliens.

Second, by no stretch of the statutory language can TdA be deemed a "foreign nation or government." Those terms refer to an entity that is defined by its possession of territory and legal authority. *See* Johnson's Dictionary, *Nation* (1773) ("A people distinguished from another people; generally by their language, original, or government."); Webster's Dictionary, *Nation* (1828) ("A body of people inhabiting the same country or united under the same sovereign government; as the English nation"); Johnson's Dictionary, *Government* (1773) ("An established state of legal authority."). Applying the whole-text canon again, *see supra*, confirms that Congress had in mind state actors. First, the AEA presumes that a designated nation possesses treaty-making powers. *See* 50 U.S.C. § 22 ("stipulated by any treaty . . . between the United States and the hostile nation or government"). Nations—not criminal organizations—are the entities that enter into treaties. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 505, 508 (2008) (treaty is "a compact between independent nations" and "agreement among sovereign powers") (internal quotation marks omitted); *Holmes v. Jennison*, 39 U.S. 540, 570-72 (1840) (similar). Second, when a "nation or government" is designated under the AEA, the statute unlocks power over that nation or government's "natives, citizens, denizens, or subjects." 50 U.S.C. § 21.

Countries have "natives, citizens, denizens, or subjects." By contrast, criminal organizations, in the government's own view, have "members." Proclamation § 1 ("members of TdA").

Historical context also reflects Congress's intent to address conflicts with foreign sovereigns, not criminal gangs. *See* 5 Annals of Cong. 1453 (Apr. 1798) ("[W]e may very shortly be involved in war . . ."); John Lord O'Brian, Special Ass't to the Att'y Gen. for War Work, N.Y. State Bar Ass'n Annual Meeting: Civil Liberty in War Time, at 8 (Jan. 17, 1919) ("The [AEA] was passed by Congress . . . at a time when it was supposed that war with France was imminent."). This comports with the founding-era, common law understanding of the term "alien enemy" as subject of a foreign state at war with the United States. *See Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2 (1950) (collecting cases).

On this statutory element, the Proclamation again fails *on its face*. It never asserts that TdA is a foreign "nation" or "government." For good reason. As a criminal gang, TdA possesses neither a defined territory nor any legal authority. Resp.App. 269a–270a, 279a–280a, 289a. The Proclamation asserts that "[o]ver the years," the Venezuelan government has "ceded ever-greater control over their territories to transnational criminal organizations." But the Proclamation notably does *not* say that TdA operates as a government in those regions.[17] In fact, the Proclamation does not even specify that TdA currently controls *any* territory in Venezuela. And even as the Proclamation singles out certain Venezuelan nationals, it does not claim that *Venezuela* is invading the United States.[18]

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[17] Guantanamo Bay provides an analogy. There, the United States controls the naval base on the island. But the United States' control of a piece of land does not somehow render it the "government" of Cuba.

[18] And, as the President's own CIA Director recently testified, the intelligence community has no assessment that says the US is at war with or being invaded by Venezuela. *See National*

Moreover, the Proclamation designates TdA "members" as subject to AEA enforcement—but "members" are not "natives, citizens, denizens, or subjects" within the meaning of the statute. That glaring mismatch underscores that Defendants are attempting not only to use the AEA in an unprecedented way, but in a way that Congress never permitted—as a mechanism to address, in the government's own words, a *non*-state actor. *Venezuela* has natives, citizens, and subjects, but TdA (not Venezuela) is designated under the proclamation. No amount of wordplay can avoid the obvious fact that *Venezuela* is the relevant country for statutory purposes here—and TdA is a non-state criminal organization.

Not only does the Proclamation fail on its face, but it is simply incorrect as a factual matter. Experts who have spent years studying TdA are in accord that Venezuela is not directing, controlling, or otherwise influencing TdA's actions in the United States. Resp.App. 270a–271a ("absolutely implausible" that Maduro regime controls TdA or that the two are intertwined); *id.* at 280a (no evidence that TdA "maintains stable connections with the Venezuelan state or that the Maduro regime directs its actions toward the United States"); *id.* at 283a, 288a–289a (Proclamation's characterization of the relationship between the Venezuelan state and TdA with respect to TdA's activities in the United States is "simply incorrect"). The President's own intelligence agencies reached that same conclusion prior to his invocation of the AEA. *See id.* at

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Security and Intelligence Officials Testify on Global Threats at 57:59–58:10, C-SPAN (Mar. 26, 2025), https://www.cspan.org/program/house-committee/national-security-and-intelligence-officials-testify-on-globalthreats/657380 (Q: "Does the intelligence community assess that we are currently at war or being invaded by the nation of Venezuela?" A: "We have no assessment that says that."); *also available at* https://www.cspan.org/program/house-committee/national-security-and-intelligence-officials-testify-on-globalthreats/657380.

433a ("shared judgment of the nation's spy agencies" is "that [TdA] was not controlled by the Venezuelan government").

Finally, Congress passed the AEA within weeks of the Alien Friends Act ("AFA"). That second law gave the President broader discretion to deport any noncitizen whom he considered "dangerous to the peace and safety of the United States," regardless of whether a sovereign invasion or war had occurred. An Act Concerning Aliens § 1, 1 Stat. 571. As such, the 1798 Congress clearly meant to grant the President two distinct powers—the power to remove the nationals of foreign enemy sovereign countries in times of a war or imminent war, and the power to remove particularly dangerous noncitizens in times of war or peace. The government's preferred interpretation of the AEA—where the President can remove allegedly dangerous people by deciding that virtually anything qualifies as a predatory incursion or invasion and anyone qualifies as a foreign nation or government, and no court can review those determinations—countertextually conflates the different statutory powers Congress conferred separately in the AEA and the AFA. But it would have made little sense for Congress to pass two laws within weeks of each other, unless those laws were meaningfully different. And the critical difference is, of course, the statutory limitations on when the President can use the AEA—it is a particular tool for a particular situation, namely the presence of nationals of a belligerent country during wartime, which simply does not apply to present circumstances.[19]

[19] Treating the AEA like the AFA is particularly untenable given that the AFA was "widely condemned as unconstitutional by Madison and many others" and quickly allowed to lapse. *Sessions v. Dimaya*, 584 U.S. 148, 185 (2018) (Gorsuch, J., concurring) (the AFA "is one of the most notorious laws in our country's history").

The government cannot elide these statutory bounds by pointing to the President's inherent Article II power. The President has no constitutional power to unilaterally remove people. Under Article I, Congress holds plenary power over immigration. *INS v. Chadha*, 462 U.S. 919, 940 (1983). The AEA operates as a specific delegation of authority from Congress to the President, a delegation that Congress specifically limited to instances of war or imminent war by a foreign nation or government. *Cf. Youngstown*, 343 U.S. at 635–38. The President is not at liberty to exceed those statutory powers or to exercise them outside of the context of war or imminent war. Thus, the sole question here is whether the executive's conduct conflicts with the constraints that Congress has imposed.

If Congress had intended to vest the President with broader authority, it could have said so. For instance, Congress knows how to delegate authority against nonstate actors to the Executive Branch when it wants to. *See* 22 U.S.C. § 6442a ("review and identify any non-state actors operating in any such reviewed country"); 18 U.S.C. § 2339A (criminalizing providing material support to non-state actors). And here, Congress intentionally limited the AEA's scope to certain actions taken by a "foreign nation" or "government." 50 U.S.C. § 21. It has never amended the statute to broaden that scope.

Under Justice Jackson's *Youngstown* framework, the President is taking measures incompatible with the expressed will of Congress, and accordingly, he is acting as his "lowest ebb" of power. *Youngstown*, 343 U.S. at 637–38. Because he has no inherent constitutional power to unilaterally remove people, Congress's powers prevail. Courts "can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." 343 U.S. at 637–38. But there is simply no ground for ignoring the statutory constraints that

Congress has established, nor for disabling Congress's constitutional authority to legislate with respect to immigration and its own war powers. *See Chadha*, 462 U.S. at 940; *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006).

Moreover, even when the executive asserts war powers, this Court has repeatedly refused to grant the President a blank check as Commander-in-Chief. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (rejecting executive's argument that noncitizens designated as "enemy combatants" outside the United States have no habeas privilege); *Hamdan*, 548 U.S. at 593, 635 (rejecting executive's convening of military commission as unlawful because it failed to satisfy statute's requirements); *Hamdi*, 542 U.S. at 530, 535–36 (rejecting executive's arguments about the process due to alleged enemy combatants); *Ex Parte Milligan*, 71 U.S. 2, 125 (1866) ("[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war . . . and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen."); *see also Hamdi*, 542 U.S. at 530 ("[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.").

If Defendants were allowed to designate any group with ties to officials as a foreign government, and courts were powerless to review that designation, any group could be deemed a government, leading to an untenable and overbroad application of the AEA. The same is true of an invasion or predatory incursion. If the President were to have unreviewable authority to

designate migration or criminal acts "invasions" or "predatory incursions," the Act would quickly become a limitless source of power.

In short, the government has failed to carry its burden on likelihood of success on the merits.

V. PROVISIONAL CLASS CERTIFICATION WAS PROPER.

In a last-ditch effort, the government argues that the Court can preserve the TRO as to the individual plaintiffs but vacate the TRO granted to the class. But the government did not properly petition the Circuit for review of its arguments against class certification, Fed. R. Civ. P. 23(f). *See Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 193 (2019) (explaining that "the Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment"). At the court of appeals, its only mention of the class relief was to criticize the district court for its "highly truncated class procedures" as "an excuse for the [c]ourt to issue a universal injunction," Resp.App. 163a, 185a, but the government did not raise any arguments about why the certified class does not satisfy Rule 23's requirements. That alone is reason not to address the argument now. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) ("The Court of Appeals . . . did not address this argument, . . . and, for that reason, neither shall we").

Defendants ignore the posture of the district court's *provisional* class certification order in the context of granting a TRO; the two orders work together to preserve the status quo and the district court's ability to manage the preliminary injunction litigation to come. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v.*

Camenisch, 451 U.S. 390, 395 (1981) (on preliminary injunctions). Class certification was proper under Rule 23's requirements. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). The government asserts that the district court did not engage in a "rigorous analysis," App. 25, but it was plainly evident—and the government did not argue to the contrary—that Plaintiffs could show numerosity, commonality, typicality, and adequacy where the government was about to deport at least two planes full of similarly-situated noncitizens who did not have final orders of removal yet were being summarily removed on the basis of the government's proclaimed AEA authority. Although Rule 23 does not require a class certification hearing, *Hartman v. Duffey*, 19 F.3d 1459, 1473 (D.C. Cir. 1994) ("We emphasize that there is no requirement in this circuit that a trial court conduct an evidentiary hearing or make specific factual findings on the issue of class certification in every case."), the government had an opportunity to brief the issue during the motion to vacate phase of this litigation, and said very little. Resp.App. 73a n.1. This is consistent with how district courts routinely handle class certification requests in conjunction with motions for interim relief,[20] especially on the understanding that an order provisionally certifying a class (as this one was) can be altered or amended before a final decision on the merits. Fed. R. Civ. P. 23(c)(1)(C); App. 169a (Boasberg, J.) (provisionally certifying the class under Fed. R. Civ. P. 23(a) and 23(b)(2)). This is also consistent with the well-established principle that

[20] *See, e.g.*, *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Pompeo*, 334 F.R.D. 449, 452 n.1 (D.D.C. 2020) (certifying class on provisional basis for sole purpose of resolving, *inter alia*, plaintiffs' motion for preliminary injunction); *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 44 (D.D.C. 2017) (provisionally certifying class for the sole purpose of resolving plaintiffs' motion for preliminary injunction); *cf. Betschart v. Oregon*, 103 F.4th 607, 615 (9th Cir. 2024) (defendant did not challenge class certification on appeal, and court declined to so for it, where district court certified a class in conjunction with issuing a classwide TRO in a five-paragraph decision).

preliminary relief is typically appropriate where, as here, failing to act would extinguish the parties' rights before full adjudication is possible.

Indeed, the concerns underpinning Rule 23(a)(4) are vindicated—not undermined—by provisional certification in this context. Rule 23(a)(4) ensures that "the representative parties will fairly and adequately protect the interests of the class." Because the certification sought here serves solely to preserve the rights of absent class members, the typical concerns about adequacy are not just inapplicable—they are affirmatively avoided. *Cf., e.g.*, *Frank v. Gaos*, 586 U.S. 485, 495 (2019) (Thomas, J., dissenting) (raising concerns about class actions that "serve[] only as a vehicle through which to extinguish the absent class members' claims without providing them any relief").

Further, the district court's oral findings to provisionally certify the class were sufficient in light of the exigent circumstances of the initial hearing, the government's opportunity to contest those findings at both the March 15 and the March 21 hearings, and their provisional nature. App. 165a, 169a; *cf. United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1202 (10th Cir. 2007) (Gorsuch, J.) (courts do not need "'ritualistic incantation to establish consideration of a legal issue, nor [must] . . . the district court recite any magic words to prove that it considered the various factors Congress instructed it to consider") (internal quotation marks and citation omitted). Nor did the district court fail to satisfy other procedural requirements of Rule 23: the court clearly defined the class, worked with parties to identify the specific claims at issue (for instance, removing the habeas claims), and heard arguments from the government.[21] App. 165a, 168a–

[21] The government alludes to Rule 23's requirement that a court "direct appropriate notice [of the class certification decision] to the class," App. 26 (quoting Fed. R. Civ. P. 23(c)(1)(B), (2)), but that provision does not apply to Rule 23(b)(2) classes like the one here.

170a. The government does not offer a single case where a court reversed a district court's order certifying a class for purposes of emergency preliminary relief on the basis that it failed expressly to define the class claims in the provisional certification order. The cases the government cites where lower courts reversed class certification for purportedly superficial analyses, App. 26–27, are irrelevant as they did not address class certification decisions undertaken in conjunction with emergency relief as at issue here.[22]

The gist of the government's substantive argument is that the class lacks the cohesiveness necessary for classwide proceedings—but its argument is premised on a misunderstanding of Plaintiffs' claims. As demonstrated above, Plaintiffs can and are bringing a systemic challenge to the government's authority to invoke the AEA and remove anyone whom the government designates to be a TdA member without compliance with the AEA, INA, APA, and due process. Classwide proceedings as to any one of those issues will generate a common answer to at least one common question, which suffices to satisfy commonality. *See Dukes*, 564 U.S. at 359. The named Plaintiffs' claims are also typical and they adequately represent the class because the class is defined as those who are "subject to" the Proclamation, regardless of whether they choose to contest TdA membership.[23] *See* Merriam Webster Dictionary, *Subject To* (2025) (defining "subject to" as, *inter alia*, "affected by or possibly affected by," "likely to do, have, or suffer

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[22] The government makes a passing suggestion that the class is not "ascertainable," App. 25, an implicit requirement for certification in some circuits. But the class definition here clearly references a specific set of persons identifiable by objective criteria and accordingly easily meets the ascertainability requirement. Indeed, the government has identified the number of people it has removed based on the Proclamation and who are currently in detention subject to the Proclamation. Resp.App. 449a.

[23] There also is no conflict of interest between Plaintiffs and the class as there was in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), App. 28, given that Plaintiffs have just as much of an interest in challenging the Proclamation as other members of the class.

from"). They also seek the same relief, including an injunction and declaration against implementation of the Proclamation, as well as a fair process for those "subject to" the Proclamation. Regardless of each class member's individual facts and defenses to an accusation of TdA membership, Plaintiffs need to show only that their proposed *class* claims can be litigated on a classwide basis by rising or falling together. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). Class counsel's agreement to forestall consideration of the habeas claims also raises no adequacy concerns as these claims were dismissed without prejudice, so could be realleged; and regardless, any class member claims that are individualized in nature do not merge into a class judgment and are not barred thereafter. *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 880 (1984); *see generally*, William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 18:17 (6th ed. 2022).

Provisional class certification here is especially crucial considering the government's express admission that it is *not* providing individuals notice that they will be subject to the Proclamation, and hence will not provide them the opportunity to challenge their designations prior to removal. Absent a classwide TRO, the government can—and has already stated it will—immediately remove individuals pursuant to the Proclamation. And nothing precludes Defendants from seeking relief from or changes to the provisional class certification order in the district court as litigation proceeds there.

CONCLUSION

The Court should deny the government's application to vacate the district court's orders and its request for a stay.

Respectfully submitted,

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