April 29, 2025

Mr. Ben Saul
Special Rapporteur on the promotion and protection of human rights while countering terrorism
Office of the High Commissioner for Human Rights
Palais Wilson
8-14 Avenue de la Paix
1211 Genève 10
hrc-sr-ct@un.org

Dr. Alice Jill Edwards
Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment
Office of the High Commissioner for Human Rights
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RE: Removal of Venezuelan nationals from the United States to El Salvador's Centro de Confinamiento Contra el Terrorismo under the Alien Enemies Act of 1798.

Dear Special Rapporteurs Ben Saul and Alice Jill Edwards:

Reports suggest that the United States and El Salvador have an agreement pursuant to which the United States will pay El Salvador six million dollars to detain individuals removed from the United States for a period of one year.

We write regarding the case of *J.G.G. et al.*,[1] an on-going legal challenge to the government of the United States' removal of Venezuelan nationals from the United States to El Salvador by improperly utilizing a wartime legal authority to circumvent domestic immigration law and binding international human rights obligations.

We wish to bring this case to your attention because of the nature of your mandates, and our serious concerns that by summarily removing these men and other noncitizens from the

United States to imprisonment in El Salvador, the United States is violating fundamental human law, including the absolute prohibition on torture and other forms for cruel, inhuman, and degrading treatment.

We request that as a matter of urgency you take up this case with the governments of the United States and the Republic of El Salvador. We ask that you investigate the United States abusive and factually inaccurate listing of Tren de Aragua as a terrorist organization, and the subsequent removal of Venezuelan nationals to El Salvador in violation of international human rights laws.

We enclose copies of the following documents relevant to your investigation:

a) The Amended Complaint filed by the ACLU on April 24, 2025, in the United States District Court for the District of Columbia in *J.G.G. v. Trump*. The Amended Complaint names Liyanara Sanchez as a Petitioner-Plaintiff on behalf of her husband Frengel Reyes Mota, who consented to the filing of this submission.
b) Juanita Goebertus' Declaration filed on March 19, 2025, in the District Court for the District of Columbia in *J.G.G. v. Trump*. Ms. Goebertus is the Director the Americas Division at Human Rights Watch.
c) Dr. Sarah C. Bishop's Declaration on Risks for Non-Salvadorean Actors Facing Third Country Removal to El Salvador, filed on March 19, 2025, in the District Court for the District of Columbia in *J.G.G. v. Trump*.
d) Preliminary decisions from the United States Circuit Court for the District of Columbia and the United States Supreme Court.

Further information on the U.S. litigation can be found at https://www.aclu.org/cases/j-g-g-v-trump and https://www.aclu.org/alien-enemies-act-habeas-petitions.

I. Introduction

On March 14, 2025, the Trump administration invoked the Alien Enemies Act of 1798 ("AEA") to summarily expel an estimated 137 Venezuelan nationals to El Salvador, claiming they were members of the Tren de Aragua organization who were engaged in an "invasion" of the United States.[2] These individuals are now arbitrarily detained by the Salvadoran government at the Centro de Confinamiento Contra el Terrorismo ("CECOT") in egregious conditions.

On March 15, 2025, the ACLU and Democracy Forward filed a class action complaint challenging the legality of the President's Proclamation that authorized the expulsions under the AEA.[3] At a hearing the same day, the District Court for the District of Columbia provisionally certified a class of noncitizens subject to the Proclamation and subsequently issued a temporary restraining order ("TRO") prohibiting their removal from the United States for fourteen days.[4] The U.S. government immediately appealed the TRO. On March 26, the District of Columbia appeals court rejected that appeal.[5] The government then sought an administrative stay or

summary vacatur of the TRO from the United States Supreme Court. On April 7, the Supreme Court vacated the TRO on the grounds that the case should have been brought in habeas corpus, and where the individuals were confined, not in the District of Columbia,[6] while noting that individuals cannot be deported without the opportunity to challenge their removal.[7] In response, the ACLU subsequently filed complaints in the Southern District of Texas, the Northern District of Texas, the Southern District of New York, the District of Colorado, and the Western District of Pennsylvania. Despite the Supreme Court's initial order, on April 17 the United States set in motion plans to remove plaintiffs without the opportunity to challenge their removal. On April 19, 2025, the Supreme Court intervened for a second time ruling that the government "is directed not to remove any member of the putative class of detainees from the United States until further order of this Court[,]"[8] in other words, the Supreme Court blocked the government from moving forward with removals of individuals detained in Texas, but did not rule on the validity of the removals under the AEA.

The U.S. government's removals violate binding human rights obligations under the Convention against Torture ("CAT") and the International Covenant on Civil and Political Rights ("ICCPR") as well as customary international law protecting the right to life, liberty, and security of persons, and the prohibition against non-refoulement which is also a bedrock principle of the Refugee Convention.

II. Key Facts Relating to the Expulsion of Venezuelan Nationals from the United States and their Detention in El Salvador

The Alien Enemies Act, is a U.S. statute enacted in 1798, which grants the President the authority to regulate, detain, and remove enemy aliens in time of war or invasion by a foreign nation or government.[9] On March 14, the President signed a Proclamation that Tren de Aragua ("TdA"), a Venezuelan gang, is "perpetrating, attempting, and threatening an invasion or predatory incursion" against the United States.[10] In the U.S. government's view the Proclamation authorizes the expulsion of any Venezuelan noncitizen it identifies as a member of TdA from the United States under the AEA.[11]

On March 15, the ACLU, on behalf of Venezuelan nationals at risk of deportation under the AEA, filed a class action legal complaint alleging that the Proclamation violated the AEA, unlawfully bypassed U.S. immigration laws, and violated the U.S. Constitution.[12] The District Court for the District of Columbia provisionally certified a class of noncitizens subject to the Proclamation,[13] and issued two TROs the same day, prohibiting the government removing the men and any other class members from the United States for fourteen days.[14] The government immediately appealed the TRO. In its appeal the government argued that the removals were lawful under the AEA because the terms of the statute encompass "'the arrival somewhere of people or things who are not wanted there.'"[15] On April 7, the United States Supreme Court lifted the TRO, ruling that the case should have been filed in Texas, as the individuals subject to removal were confined in Texas at the time of the complaint. [16] The Court did not rule on the whether the removals were proper under the AEA, but rather ruled that the individuals subject to the Proclamation maintain the right to judicial review and must have the opportunity to challenge their removal under the AEA.[17]

Prior to the Proclamation, Immigration and Customs Enforcement ("ICE") moved Venezuelan detainees into position such that, when the Proclamation was made public, the detainees were already being transported to the airport and loaded onto planes.[18] Those flights took off quickly and, despite the March 15 District Court's order to return individuals on the flights who were being removed pursuant to the AEA, the planes continued to El Salvador.[19] Late on March 15, the aircraft landed in El Salvador where Salvadoran authorities transported the men to CECOT, a facility well-known for its egregious conditions of confinement.[20]

On March 16, El Salvador's President Nayib Bukele tweeted a New York Post headline about the District Court's order to return removal flights, adding the sardonic comment "Oopsie … Too late."[21] Secretary of State Marco Rubio re-tweeted Bukele's post from his personal X account, highlighting the Trump administration's disregard for court orders.[22]

The United States had substantial grounds to believe that the men would be subject to cruel, inhuman, or degrading treatment that may even amount to torture at CECOT, as the systemic abusive conditions there have been well documented. [23] In 2023, the U.S. State Department in its annual human rights reporting on El Salvador noted that there were credible reports of "torture or cruel, inhuman, or degrading treatment or punishment by security forces" in Salvadoran prisons and "harsh and life-threatening prison conditions[.]"[24] For decades, non-governmental organizations have documented widespread use of torture in El Salvador's prisons, including waterboarding, electric shocks, forcing detainees into ice water for hours, and beatings so severe that they cause broken bones and ruptured organs.[25]

El Salvador's current incarceration system reflects the highest imprisonment rate in the Americas, with 1.8 percent of the population—or three out of every 100 men—behind bars.[26] Rights abuses are endemic to the country's prison system.

CECOT has capacity to detain up to 40,000 individuals. To prevent overcrowding, non-governmental organizations contend this capacity should be substantially lower.[27] Prison guards subject persons detained there to cruel, inhuman, and degrading treatment, including severely overcrowded cells, lack of essential services, unsanitary conditions linked to prisoner deaths, physical and verbal abuse, severe restrictions on basic necessities, limited to 30 minutes of daily cell exit, and instances of solitary confinement in completely dark cells.[28] Conditions are described as "hellish," with documented cases of deaths resulting from beatings, torture, and inadequate medical care.[29]

On information and belief, approximately 137 class members from the ACLU litigation are presently held at CECOT, including:

Andry Jose Hernandez Romero, a gay professional makeup artist who formerly worked at a Venezuelan government news channel.[30] Before the United States removed Mr. Romero to El Salvador he passed his asylum credible fear interview having suffered persecution on the basis of his sexual orientation and political opinion. The U.S. government detained and removed Mr. Romero to El Salvador because he had two crown tattoos, which in the government's opinion identified him as a member of TdA, despite expert testimony that TdA does not have identifying tattoos.[31]

Frengel Reyes Mota, a Venezuelan national who fled Venezuela and sought asylum in the United States after facing violence from paramilitary groups. Mr. Reyes Mota's wife saw his name on a public list of Venezuelans deported to El Salvador and became alarmed that the U.S. had removed and detained him at CECOT. She has not been able to speak with him since his removal.

Jerce Reyes Barrios, a professional soccer player who was tortured in Venezuela with electric shocks and suffocation after protesting Maduro's regime, was accused of TdA membership based on a soccer-ball-with-crown tattoo and a social media post showing a hand gesture meaning "I love you" in sign language. The United States removed Mr. Barrios before his scheduled immigration hearing, where he could have explained his tattoo and social media post.[32]

Neri Alvarado Borges was detained by ICE because of his tattoos, including an autism awareness ribbon with his autistic brother's name, and despite a previous ICE determination that Mr. Borges had no connection to TdA.[33]

Mr. Silva, who was detained and removed despite having suffered death threats and physical violence in Venezuela due to his parents' political activities and despite having a pending asylum claim and a grant of relief under the Convention against Torture domestic regulations.[34]

E.V., who already had refugee status after seventeen months of background checks by the United Nations, International Organization for Migration, and U.S. Citizenship and Immigration Services, that confirmed his persecution by Venezuelan paramilitary groups for exposing the Venezuelan government's shortcomings.[35]

At the time of removal, the United States had substantial grounds to believe that if the men were detained in El Salvador that they would be subjected to torture and other cruel, inhuman, and degrading treatment at CECOT.

III. The Proclamation Violates International and Domestic Human Rights Law

The government's removal of Venezuelan nationals to El Salvador violates its binding international human rights obligations under the Convention against Torture, the International Covenant on Civil and Political Rights, the Refugee Convention, and customary international law, all of which prohibit refoulement to states where there are substantial grounds to believe individuals may be subject to torture or cruel, inhuman, or degrading treatment.[36] United States law incorporated these binding international obligations.[37]

A. United States' violations of CAT, ICCPR, the Refugee Convention, and customary international law.

The U.S. government's removal of Venezuelan nationals to El Salvador violates fundamental human rights obligations binding on the United States including: the Convention

Against Torture, International Covenant on Civil and Political Rights ("ICCPR"), the Refugee Convention, and customary international law, all of which mandate non-refoulement. The United States has implemented its non-refoulement obligations into domestic law.[38]

The Convention against Torture, article 3 prohibits state parties from expelling, returning, or extraditing "a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."[39] Non-refoulement is also encompassed by article 7 of the ICCPR (prohibition of torture and other cruel, inhuman, or degrading treatment)[40] and article 33 of the Refugee Convention.[41] In assessing the risk of torture, authorities "shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[42] The Convention against Torture article 16 and ICCPR, article 7 also prohibit any act that constitutes cruel, inhuman, or degrading treatment or punishment, and the removal of anyone by a State to another where there are substantial grounds for believing that they may be subject to cruel, inhuman, or degrading treatment there.[43] The prohibition of torture and other cruel, inhuman, or degrading treatment and the principle of non-refoulement are *jus cogens*, non-derogable rights under customary international law.[44]

B. United States domestic framework implementing the principle of non-refoulement.

The United States has incorporated CAT article 3 domestically through the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA").[45] FARRA prohibits the United States from involuntarily returning "any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture. . ."[46] The implementing regulations establish mandatory withholding or deferral of removal for individuals who demonstrate they are more likely than not to face torture.[47] These protections apply regardless of the mechanism for removal.

The INA, is the "sole and exclusive procedure" for removal and contains distinct procedures for expedited removal or national security cases.[48] 8 U.S.C. § 1442(e) expressly requires that the removal of alien enemies be "consistent with the law."[49] The INA implements the Refugee Convention's protections on asylum, and though it does not expressly engage with the broader principle of non-refoulement, it does mandate that individuals not be returned to their country of origin if they can show that their "life or freedom would be threatened."[50] No carveout exists for "alien enemies" with respect to removal.

The United States government argues that neither FARRA, implementing CAT, nor the INA, applies to removals governed by the AEA.[51] But this violates the United States' non-refoulement obligations.

IV. Requests

We request that, as a matter of urgency, you investigate and report on the human rights implications of the U.S. government's use of the Alien Enemies Act to expel Venezuelan nationals and others from the United States to El Salvador, and El Salvador's continued detention of these individuals in CECOT.

We appreciate any consideration or action that you deem appropriate. Please do not hesitate to contact the authors if you require any further information or clarification on any of the allegations made.

Sincerely,

Jamil Dakwar
Director, Human Rights Program
American Civil Liberties Union
125 Broad Street, Suite 18
New York, NY 10004
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[1] On April 24, 2025, the ACLU filed an Amended Complaint. The Amended Complaint contains a new case caption in correspondence with the procedural changes from the ACLU's lawsuits in different federal jurisdictions. Amended Class Action Petition for Writ of Habeas Corpus and Complaint, *Sanchez v. Trump*, No. 1:25-cv-00766-JEB (D.D.C. filed Apr. 24, 2025).
[2] 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).
[3] Class Action Complaint and Petition for Writ of Habeas Corpus (Compl.), *J.G.G. v. Trump*, No. 1:25-cv-766 (D.D.C. Mar. 15, 2025).
[4] Motion for Temporary Restraining Order (Motion for TRO), *J.G.G. v. Trump*, No. 1:25-cv-766 (D.D.C. Mar. 15, 2025); Second Minute Order, *J.G.G. v. Trump*, No. 1:25-cv-766 (D.D.C. Mar. 15, 2025).
[5] *J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682, at *16 (D.C. Cir. Mar. 26, 2025) (quoting Invasion, Black's Law Dictionary (12th ed. 2024)).
[6] *Id*.
[7] See *Trump v. J.G.G.*, 604 U.S. ---, 2025 WL 1024097, at *2 (Apr. 7, 2025) (per curiam).
[8] Order, *A.A.R.P. v. Trump*, No. 24A1007, 604 U.S. ---, (Apr. 19, 2025).
[9] Compl., *supra* note 3, at 7.
[10] *See* Proclamation, *supra* note 3; *see also* Mot. for TRO, *supra* note 4, at 4-5.
[11] *Id*.
[12] *See generally* Compl., *supra* note 3.
[13] *See* March15 Oral Hearing at the District Court for the District of Columbia at 15:4-18:8.
[14] Second Minute Order, *supra* note 4.
[15] *J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682, at *16 (D.C. Cir. Mar. 26, 2025) (quoting Invasion, Black's Law Dictionary (12th ed. 2024)).
[16] *See Trump v. J.G.G.*, *supra* note 5.
[17] *Id*.
[18] Plaintiffs' Motion for Preliminary Injunction, *J.G.G. v. Trump*, No. 1:25-cv-766, at 2 (D.D.C. Mar. 15, 2025).
[19] *Id.*
[20] *See generally* Goebertus Decl.; Bishop Decl.; Amnesty International, Human Rights Watch, the American Civil Liberties Union, Memorandum on DHS Secretary Kristi Noem's Visit to El Salvador Mega-Prison, March 25, 2025.
[21] Amnesty International, Human Rights Watch, the American Civil Liberties Union, Memorandum on DHS Secretary Kristi Noem's Visit to El Salvador Mega-Prison, March 25, 2025.
[22] *Id*.
[23] U.S. Dep't of State, *Country Reports on Human Rights Practices for 2023: El Salvador*, 2023, https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/el-salvador/; Amnesty International,

Human Rights Watch, the American Civil Liberties Union, Memorandum on DHS Secretary Kristi Noem's Visit to El Salvador Mega-Prison, March 25, 2025; Goebertus Decl.

[24] U.S. Dep't of State, *Country Reports on Human Rights Practices for 2023: El Salvador*, 2023, https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/el-salvador/.

[25] Amnesty International, Human Rights Watch, the American Civil Liberties Union, Memorandum on DHS Secretary Kristi Noem's Visit to El Salvador Mega-Prison, March 25, 2025.

[26] *Id*.

[27]Amnesty International, Human Rights Watch, the American Civil Liberties Union, Memorandum on DHS Secretary Kristi Noem's Visit to El Salvador Mega-Prison, March 25, 2025; Goebertus Decl.; "What to know about the El Salvador mega-prison where Trump sent deported Venezuelans," THE GUARDIAN, https://www.theguardian.com/world/2025/mar/20/cecot-el-salvador-venezuela-prison-trump-deportations; Amnesty International, "Behind the Veil of Popularity: Repression and Regression of Human Rights in El Salvador," https://www.amnesty.org/en/wp-content/uploads/2024/01/AMR2974232023ENGLISH.pdf.

[28] Amnesty International, Human Rights Watch, the American Civil Liberties Union, Memorandum on DHS Secretary Kristi Noem's Visit to El Salvador Mega-Prison, March 25, 2025, at 1-3.

[29] *Id*.

[30] Plaintiffs' Motion for Preliminary Injunction, *supra* note 18, at 3-5.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171; U.N. Human Rights Committee, General Comment No. 20, Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, ICCPR Fourty-fourth Session, ¶ 9 Mar. 10, 1992; *see Prosecutor v. Katanga,* Case No. ICC-01/04-01/07-34-05-tENg, Decision on the Application for the Interim Release of Detained Witnesses of 1 October 2013, Trial Chamber II, International Criminal Court, at ¶ 30; U.N. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 (1951).

[37] Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242; Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101).

[38] *Id*.

[39] U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988).

[40] International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

[41] U.N. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 (1951).

[42] Convention against Torture*, supra* note 36.

[43] *Id.*; ICCPR, *supra* note 36.

[44] *Prosecutor v. Katanga*, *supra* note 36.

[45] Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242.

[46] *Id*.

[47] 8 C.F.R. §§ 208.16-18.

[48] 8 U.S.C. § 1229a(a)(3) (expedited removal proceedings); 8 U.S.C. § 1531 et seq. (fast-track proceedings for noncitizens posing national security risks).

[49] 8 U.S.C. § 1442(e).

[50] 8 U.S.C. § 1158(a)(2)(A).

[51] Defendants' Opposition to Motion for Preliminary Injunction, *J.G.G. v. Trump*, No. 1:25-cv-766, at 24-27 (D.D.C. Mar. 15, 2025).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIYANARA SANCHEZ, as next friend on behalf of FRENGEL REYES MOTA,
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

D.A.R.H.,* as next friend on behalf of ANDRY JOSE HERNANDEZ ROMERO,
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

M.Z.V.V., as next friend on behalf of J.A.B.V.,*
El Valle Detention Facility
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125 Broad Street, 18th Floor
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M.Y.O.R., as next friend on behalf of M.A.O.R.,*
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125 Broad Street, 18th Floor
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M.M.A.A., as next friend on behalf of G.A.A.A.,*
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

DORYS MENDOZA, as next friend on behalf of M.R.M.,*
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

EYLAN SCHILMAN, as next friend on behalf of T.C.I.,*
c/o American Civil Liberties Union,

Case No. 1:25-cv-00766-JEB

AMENDED CLASS ACTION PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT

125 Broad Street, 18th Floor
New York, NY 10004;

Petitioners–Plaintiffs,

J.G.G.,*
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

G.F.F.,*
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

J.G.O.,*
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

W.G.H.,*
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

J.A.V.,*
c/o American Civil Liberties Union,
125 Broad Street, 18th Floor
New York, NY 10004;

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, The White House, 1600 Pennsylvania Avenue, NW, Washington, D.C. 20500;

PAMELA BONDI, Attorney General of the United States, in her official capacity, 950 Pennsylvania Ave., NW, Washington, DC, 20530;

KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, in her official capacity, 245 Murray Lane SW, Washington, DC 20528;

U.S. DEPARTMENT OF HOMELAND SECURITY, 245 Murray Lane SW, Washington, DC 20528;

MADISON SHEAHAN, Acting Director and Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement, in her official capacity, 500 12th Street, SW, Washington, DC 20536;

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 500 12th St. SW, Washington, DC 20536;

MARCO RUBIO, Secretary of State, in his official capacity, 2201 C Street, NW, Washington, DC 20520;

U.S. STATE DEPARTMENT, 2201 C Street, NW, Washington, DC 20520;

PETE HEGSETH, Secretary of Defense, in his official capacity, 100 Defense Pentagon, Washington, DC 20301; and,

U.S. DEPARTMENT OF DEFENSE, 100 Defense Pentagon, Washington, DC 20301;

Respondents–Defendants.

INTRODUCTION

1. Petitioners–Plaintiffs ("Petitioners") and Plaintiffs[1] are Venezuelan men threatened with imminent removal or who have already suffered removal under the President's Proclamation invoking the Alien Enemies Act ("AEA"), a wartime measure that has been used only three times before in our Nation's history: the War of 1812, World War 1, and World War II.

2. The Proclamation authorizes "immediate" removal of noncitizens that the Proclamation deems to be alien enemies, without any opportunity for judicial review. It also contorts the plain language of the AEA: arrivals of noncitizens from Venezuela are deemed an "invasion" or "predatory incursion" by a "foreign nation or government," where Tren de Aragua, a Venezuelan gang, is deemed to be sufficiently akin to a foreign nation or government.

3. But the AEA has only ever been a power invoked in time of war, and plainly only applies to warlike actions: it cannot be used here against nationals of a country—Venezuela—with whom the United States is not at war, which is not invading the United States, and which has not launched a predatory incursion into the United States.

4. Multiple judges—including this Court—have already held that there is likely no authority for the government's actions. *See, e.g.*, *J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682, at *5–10 (D.C. Cir. Mar. 26, 2025) (Henderson, J., concurring) (AEA predicates of

[1] Plaintiffs are the original Plaintiffs in *J.G.G. v. Trump*. Because Plaintiffs have filed habeas actions in their districts of confinement and do not seek relief in this Court through the writ of habeas corpus, they continue to be designated as "Plaintiffs," not "Petitioners." Petitioners-Plaintiffs ("Petitioners") refer to the newly amended individuals who are designated under the Proclamation and detained in El Salvador or criminal custody in the United States. Petitioners are pursuing their claims through habeas in addition to APA and equity.

"invasion" or "predatory incursion" not met); *id*. at *13 (Millett, J., concurring) ("The Constitution's demand of due process cannot be so easily thrown aside."); *D.B.U v. Trump*, No. 1:25-cv-01163, 2025 WL 1163530, at *9–12 (D. Colo. Apr. 22, 2025); *J.G.G. v. Trump*, No. CV 25-766 (JEB), 2025 WL 890401, at *2 (D.D.C. Mar. 24, 2025) (Boasberg, J.) ("before [petitioners] may be deported, they are entitled to individualized hearings to determine whether the Act applies to them at all").

5. Nevertheless, the government has twice attempted (once successfully) to remove individuals under the AEA without any meaningful process. First, on March 15, the government secretly loaded people onto planes, published the Proclamation, and removed at least 137 people within hours to a brutal prison in El Salvador. Those removed received no notice of their designation nor any opportunity to contest it. Second, on April 17, the government provided individuals with an English-only notice form that did not inform them of their right to seek judicial review. Hours after distributing the notices, the government loaded people onto buses and drove them towards the airport, only turning around after counsel filed an emergency appeal in the Supreme Court.

6. These repeated attempts to use the Proclamation to remove noncitizens without any review of the determination that they are alien enemies violate the AEA, the APA, and the Constitution. For that reason, Petitioners, Plaintiffs, and the putative class that they represent seek this Court's intervention to restrain these summary removals, and to determine that this use of the AEA is unlawful and must be halted.

7. Petitioners also bring this challenge to remedy the unlawful detention of a subclass held in the notorious Terrorism Confinement Center ("CECOT") prison in El Salvador. The 137 people wrongly deported on March 15 remain incommunicado and have not spoken to

their families or attorneys in over a month now. Their families are deeply concerned for their safety, especially given reports of widespread physical and psychological abuse in Salvadoran prisons. The continuing detention of the CECOT Subclass in El Salvador violates the AEA, Fifth Amendment, Sixth Amendment, and Eighth Amendment.

JURISDICTION AND VENUE

8. This case arises under the Alien Enemies Act ("AEA"), 50 U.S.C. §§ 21–24; the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*; the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.* and its implementing regulations; the Convention Against Torture ("CAT"), *see* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231); and the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution.

9. This Court has subject matter jurisdiction under 28 U.S.C. § 2241 et seq. (habeas corpus), art. I, § 9, cl. 2 of the U.S. Constitution (Suspension Clause), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), 28 U.S.C. § 1361 (mandamus), and 28 U.S.C. § 1651 (All Writs Act). Respondents-Defendants ("Respondents") have waived sovereign immunity for purposes of this suit. 5 U.S.C. §§ 702, 706.

10. The Court may grant relief pursuant to 28 U.S.C. § 2241; 28 U.S.C. § 2243; the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; 28 U.S.C. § 1331; the All Writs Act, 28 U.S.C. § 1651; and the Court's inherent equitable powers.

11. Venue is proper in this District under 28 U.S.C. § 1391(e)(1) because Respondents are agencies of the United States or officers of the United States acting in their official capacity, Respondents reside in this District, and a substantial part of the events or omissions giving rise to the claim occurred in this District.

PARTIES

Petitioners and Plaintiffs

12. Petitioner Frengel Reyes Mota is a Venezuelan national who has been transferred by the government from an immigration detention facility in Texas to CECOT. Mr. Reyes Mota fled Venezuela and sought asylum in the United States after violence from paramilitary groups. As his "next friend," his wife Liyana Sanchez, brings this action on his behalf. Mr. Reyes Mota's wife saw his name on a public list of Venezuelans deported to El Salvador and became alarmed that the U.S. government had removed and detained him at CECOT. Ms. Sanchez has not been able to speak with her husband since his removal. She desires that her husband be able to challenge his designation as an "alien enemy" and to defend himself against the false allegations of his membership in a gang.

13. Petitioner Andry Jose Hernandez Romero is a Venezuelan national who has been transferred by the government from an immigration detention facility in Texas to CECOT. Mr. Hernandez Romero sought asylum in the United States after he was targeted for his sexual orientation as well as his refusal to promote government propaganda while working for a government-affiliated television station. Before he fled Venezuela, armed men connected to the government had been following and threatening him. Mr. Hernandez Romero entered using the CBP One app and passed his credible fear interview. As his "next friend," his mother D.A.R.H., brings this action on his behalf. Mr. Hernandez Romero's mother discovered that her son had been deported when his name appeared in a news article listing Venezuelans deported to El Salvador. She later heard from a journalist who told her that Andry was at CECOT, was being mistreated by guards, and was begging for his release. D.A.R.H. has done everything possible to support her son since his deportation, including speaking with his lawyer and trying to find any

information about where he is. But D.A.R.H. has been unable to contact her son since he was sent to El Salvador. She desires that her son be able to challenge his designation as an "alien enemy" and to defend himself against the false allegations of gang membership.

14. Petitioner J.A.B.V. is a Venezuelan national who has been transferred by the government from an immigration detention facility in Texas to CECOT. He fled Venezuela and sought asylum in the United States after he was violently targeted after the campaigned for the opposition leader. J.A.B.V. was abducted by masked men, beaten, and told he would be killed if he campaigned again. He was then held for several days at a police center, where he was tortured. J.A.B.V. passed his credible fear interview. As his "next friend," his mother, M.Z.V.V., brings this action on his behalf. M.Z.V.V. saw J.A.B.V.'s name on a public list of Venezuelans deported to El Salvador and became alarmed that the U.S. government had removed and detained him at CECOT. M.Z.V.V. has not been able to speak with her son since his removal. She desires that her son be able to challenge his designation as an "alien enemy" and to defend himself against the false allegations of his membership in a gang.

15. Petitioner M.A.O.R. is a Venezuelan national who has been transferred by the government from an immigration detention facility in Texas to CECOT. He was in the process of seeking protection in the United States. As his "next friend," his sister, M.Y.O.R., brings this action on his behalf. M.Y.O.R. saw M.A.O.R.'s name on a public list of Venezuelans deported to El Salvador and became alarmed that the U.S. government had removed and detained him at CECOT. M.Y.O.R. has not been able to speak with her brother since his removal. She desires that her brother be able to challenge his designation as an "alien enemy" and to defend himself against the false allegations of his membership in a gang.

16. Petitioner G.A.A.A. is a Venezuelan national who has been transferred by the government from an immigration detention facility in Texas to CECOT. He fled Venezuela and sought asylum in the United States due to the violence in his town at the hand of a paramilitary group. As his "next friend," his mother, M.M.A.A., brings this action on his behalf. M.A.A.A. saw J.A.B.V.'s name on a public list of Venezuelans deported to El Salvador and became alarmed that the U.S. government had removed and detained him at CECOT. M.M.A.A. has not been able to speak with her son since his removal. She desires that her son be able to challenge his designation as an "alien enemy" and to defend himself against the false allegations of his membership in a gang.

17. Petitioner M.R.M. is a Venezuelan national who is currently has been transferred by the government from an immigration detention facility in Texas to CECOT. As his "next friend," his mother Dorys Mendoza, brings this action on his behalf. Ms. Mendoza saw M.R.M.'s name on a public list of Venezuelans deported to El Salvador and became alarmed that the U.S. government had removed and detained him at CECOT. Ms. Mednoza has not been able to speak with her son since his removal. She desires that her son be able to challenge his designation as an "alien enemy" and to defend himself against the false allegations of his membership in a gang.

18. Petitioner T.C.I. is a Venezuelan national who is currently in criminal custody and detained in New Jersey. After leaving Venezuela, he turned himself into immigration authorities and was granted humanitarian parole. As his "next friend," his criminal defense attorney Eylan Schilman, brings this action on his behalf. T.C.I. informed Mr. Schilman that officials approached him to sign a form in English that he was a member of Tren de Aragua and subject to removal. T.C.I. refused to sign because he denies membership in Tren de Aragua or any other

gang. Mr. Schilman desires that his client be able to challenge his designation as an "alien enemy" and to defend himself against the false allegations of his membership in a gang.

19. Plaintiff J.G.G. is a Venezuelan national who is detained at El Valle Detention Center in Texas. J.G.G. is seeking asylum, withholding of removal, and CAT protection because he fears being killed, arbitrarily imprisoned, beaten, or tortured by Venezuelan state police, since they have previously done so to him. J.G.G. was nearly removed on March 15 pursuant to the Proclamation. He was pulled off the plane at the last minute due to this Court's TRO. Despite the fact that J.G.G. is not involved whatsoever with Tren de Aragua, he fears that the government will continue trying to deport him because he has tattoos and because they have previously attempted to deport him under the Proclamation.

20. Plaintiff J.A.V. is a Venezuelan national who is detained at El Valle Detention Center in Texas. J.A.V. is seeking asylum because of his political views and fear of harm and mistreatment by multiple criminal groups, including TdA. J.A.V. is not and has never been a member of TdA—he was in fact victimized by that group and it is the reason why he cannot return to Venezuela. J.A.V. was nearly removed on March 15 pursuant to the Proclamation. However, he was spared from immediate deportation due to this Court's TRO. J.A.V. fears that the government will continue trying to deport him because he has previously been designated an alien enemy.

21. Plaintiff G.F.F. is a 21-year-old Venezuelan national who is detained at Orange County Jail in New York. G.F.F. and his family fled Venezuela in part due to threats from TdA based on his sexual orientation and gender non-conformity. He also fears persecution from Venezuelan state actors, including police and paramilitary groups. G.F.F. entered the United States in May 2024 and was released on his own recognizance after passing a credible fear

interview. G.F.F. was nearly deported pursuant to the Proclamation on March 15; he was taken off the plane after this Court issued its initial TRO. G.F.F. strongly denies any association with TdA. G.F.F. fears that the government will continue trying to deport him because it has filed an I-213 identifying him as an "associate/affiliate of Tren de Aragua" and because the government previously attempted to deport him under the Proclamation.

22. Plaintiff W.G.H. is a 29-year-old Venezuelan national who is detained at El Valle Detention Center in Texas. W.G.H. is seeking asylum because he was extorted and threatened by multiple criminal groups in Venezuela, including TdA. W.G.H. is extremely afraid of returning to Venezuela or being sent to El Salvador. W.G.H. was almost deported on March 15, despite the fact that he has repeatedly denied any connection to TdA whatsoever. He was removed from the plane after this Court's TRO. W.G.H. W.G.H. fears that the government will continue trying to deport him because it has filed an I-213 stating that W.G.H. "has been identified as a Tren de Aragua gang associate" and because he was previously designated under the Proclamation.

23. Plaintiff J.G.O. is a 32-year-old Venezuelan national who is detained at Orange County Jail in New York. J.G.O. is seeking asylum in the United States because he actively protested against the Maduro regime in Venezuela and fears torture, imprisonment, or death on account of his political activism if he returns. J.G.O. was nearly deported on March 15, but was removed from the plane after this Court's TRO. J.G.O. fears that the government will continue trying to deport him pursuant to the AEA because he has been questioned about gang affiliation and because he has already been designated under the Proclamation. J.G.O. vehemently denies any affiliation with a gang.

Respondents-Defendants

24. Respondent Donald Trump is the President of the United States. He is sued in his official capacity. In that capacity, he issued the Proclamation under the Alien Enemies Act.

25. Respondent Pamela J. Bondi is the U.S. Attorney General at the U.S. Department of Justice, which is a cabinet-level department of the United States government. She is sued in her official capacity.

26. Respondent Kristi Noem is the Secretary of the U.S. Department of Homeland Security, which is a cabinet-level department of the United States government. She is sued in her official capacity. In that capacity, Respondent Noem is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103.

27. Respondent U.S. Department of Homeland Security ("DHS") is a cabinet-level department of the United States federal government. Its components include Immigration and Customs Enforcement ("ICE"). Respondent DHS is a legal custodian of Petitioners.

28. Respondent Todd Lyons is the Acting Director of ICE. Respondent Lyons is responsible for ICE's policies, practices, and procedures, including those relating to the detention of immigrants during their removal procedures. Respondent Lyons is a legal custodian of Petitioners. Respondent Lyons is sued in his official capacity.

29. Respondent ICE is the subagency of DHS that is responsible for carrying out removal orders and overseeing immigration detention. Respondent ICE is a legal custodian of Petitioners.

30. Respondent Marco Rubio is the Secretary of State, which is a cabinet-level department of the United States government. He is sued in his official capacity. In that capacity, Respondent Rubio negotiates and enters into contracts or agreements with El Salvador for the

removal and detention of Petitioners and others, and would be responsible for facilitating the return of Petitioners sent to El Salvador or any other country.

31. Respondent U.S. Department of State ("DOS") is a cabinet-level department of the United States federal government.

32. Respondent Pete Hegseth is the Secretary of Defense, which is a cabinet-level department of the United States government. He is sued in his official capacity. In that capacity, Respondent Hegseth oversees the Department of Defense and acts as the principal defense policy maker and advisor.

33. Respondent U.S. Department of Defense ("DOD") is a cabinet-level department of the Unite States federal government.

BACKGROUND

The Alien Enemies Act

34. The AEA is a wartime authority enacted in 1798 that grants the President specific powers with respect to the regulation, detention, and deportation of enemy aliens.

35. The AEA, as codified today, provides that "[w]henever 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.

36. The AEA can thus be triggered in only two situations. The first is when a formal declared war exists with a foreign nation or government. The second is when a foreign nation or government perpetrates, attempts, or threatens an invasion or predatory incursion against the territory of the United States.

37. To trigger the AEA, the President must make a public proclamation of the declared war, or of the attempted or threatened invasion or predatory incursion. *Id.*

38. Section 21 of the AEA also provides that noncitizens must be afforded a right of voluntary departure. Only noncitizens who "refuse or neglect to depart" are subject to removal. *Id.* § 21.

39. Section 22 of the AEA specifies the terms of departure for aliens designated as enemies. It grants noncitizens the full time to depart as stipulated by any treaty between the United States and the enemy nation, unless the noncitizen has engaged in "actual hostility" against the United States. If no such treaty exists, the President may declare a "reasonable time" for departure, "according to the dictates of humanity and national hospitality." *Id.* § 22.

40. The Act has been used only three times in American history, all during actual or imminent wartime.

41. The AEA was first invoked several months into the War of 1812, but President Madison did not use the AEA to remove anyone from the United States during the war.

42. The AEA was invoked a second time during World War I by President Wilson. Upon information and belief, there were no removals effectuated pursuant to the AEA during World War I.

43. The AEA was used again during World War II, though it was never used as a widespread method of removal.

44. On December 7, 1941, after the Japanese invaded Hawaii in the attack on Pearl Harbor, President Roosevelt proclaimed that Japan had perpetrated an invasion upon the territory of the United States. The President issued regulations applicable to Japanese nationals living in the United States. The next day Congress declared war on Japan.

45. On the same day, President Roosevelt issued two separate proclamations stating that an invasion or predatory incursion was threatened upon the territory of the United States by Germany and Italy. The President incorporated the same regulations that were already in effect as to Japanese people for German and Italian people. Three days later Congress voted unanimously to declare war against Germany and Italy.

46. Congress declared war against Hungary, Romania, and Bulgaria on June 5, 1942. Just over a month later, President Roosevelt issued a proclamation recognizing that declaration of war and invoking the AEA against citizens of those countries.

47. Under these proclamations, the United States infamously interned noncitizens from Japan, Germany, Italy, Hungary Romania, and Bulgaria (with U.S. citizens of Japanese descent subject to a separate order that did not rely on the AEA).

48. It was not until the end of hostilities that the President provided for the removal of alien enemies from the United States under the AEA. On July 14, 1945, President Truman issued a proclamation providing that alien enemies detained as a danger to public peace and safety "shall be subject upon the order of the Attorney General to removal from the United States." The Department of Justice subsequently issued regulations laying out the removal process. *See* 10 Fed. Reg. 12189 (Sept. 28, 1945). It was never used as a widespread method of removal.

Systemic Overhaul of Immigration Law in 1952

49. Following the end of World War II, Congress consolidated U.S. immigration laws into a single text under the Immigration and Nationality Act of 1952 ("INA").

50. The INA, and its subsequent amendments, provide for a comprehensive system of procedures that the government must follow before removing a noncitizen from the United States. The INA provides the exclusive procedure by which the government may determine whether to remove an individual. 8 U.S.C. § 1229a(a)(3).

51. In addition to laying out the process by which the government determines whether to remove an individual, the INA also enshrines particular forms of humanitarian protection.

52. First, the INA provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status," may apply for asylum. 8 U.S.C. § 1158(a)(1). To qualify for asylum, a noncitizen must show a "well-founded fear of persecution" on account of a protected ground, such as race, nationality, political opinion, or religion. 8 U.S.C. § 1101(a)(42)(A).

53. Second, Congress has barred the removal of an individual to a country where it is more likely than not that he would face persecution on one of these protected grounds. 8 U.S.C. § 1231(b)(3). That protection implements this country's obligations under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees. The relevant form of relief, known as "withholding of removal," requires the applicant to meet a higher standard with respect to the likelihood of harm than asylum; granting that relief is mandatory if the standard is met absent limited exceptions.

54. Third, the Convention Against Torture ("CAT") prohibits the government from returning a noncitizen to a country where it is more likely than not that he would face torture. *See*

8 U.S.C. § 1231 note. That protection implements the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242. As with withholding of removal, CAT relief also requires the applicant to meet a higher standard with respect to the likelihood of harm than asylum and relief is mandatory if that standard is met. There is no exception to CAT relief.

President Trump's Proclamation Invoking the AEA

55. On March 14, the President signed the AEA Proclamation at issue here. It 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." *See* Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua (Mar. 15, 2025).[2]

56. Although the AEA calls for a "public proclamation," 50 U.S.C. § 21, the administration did not make the invocation public until around 3:53 p.m. EDT on March 15.

57. The Proclamation alleges that Tren de Aragua is perpetrating, attempting, and threatening predatory incursions, hostile actions, and irregular warfare.

58. The Proclamation thus states that all Venezuelan citizens ages fourteen or older alleged to be members of Tren de Aragua—and who are not U.S. citizens or lawful permanent residents—are alien enemies.

59. The Proclamation provides no means or process for individuals to contest that they are members of the TdA and do not therefore fall within the terms of the Proclamation. Nor

[2] *Available at* 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.

does it provide individuals with an opportunity for voluntary departure, as required by Section 21. Nor does it provide the grace period required under Section 22, during which individuals can arrange their affairs. The Proclamation instead invokes Section 22's exception by claiming that all individuals subject to the Proclamation are "chargeable with actual hostility," and pose "a public safety risk."

60. As multiple judges have already found, the Proclamation is likely unlawful.

61. First, the Proclamation does not satisfy the statutory requirements for proper invocation of the Alien Enemies Act. Tren de Aragua, a criminal organization, is not a nation or foreign government and is not part of the Venezuelan government. The United States is not in a declared war with Venezuela. The United States cannot declare war against Tren de Aragua because it is not a nation. And neither Venezuela nor Tren de Aragua have invaded or threatened to invade the United States, nor has either engaged in a "predatory incursion" within the meaning of the AEA.

62. Moreover, there is no meaningful notice or meaningful opportunity for individuals to challenge their designation as alien enemies. There is thus a significant risk that even individuals who do not fall under the terms of the Proclamation will be subject to it.

63. The Proclamation also violates the process and protections that Congress has prescribed elsewhere in the country's immigration laws for the removal of noncitizens.

64. As a result, countless Venezuelans are at imminent risk of removal pursuant to the Proclamation without any hearing or meaningful review, regardless of the absence of any ties to TdA or the availability of claims for relief from and defenses to removal. And for some people, it is too late. As described in more detail below, over 130 individuals were removed on March 15

to a prison in El Salvador known for dire conditions, torture, and other forms of physical abuse—possibly for life. They have lost all contact with their attorneys, family, and the world.

Implementation of the Proclamation and Subsequent Litigation

65. Upon information and belief, prior to the public issuance of the Proclamation, Respondents developed a memorandum for federal law enforcement officers with guidance on implementation of the Proclamation.

66. Prior to the public issuance of the Proclamation, ICE had moved Venezuelan detainees into position such that, when the Proclamation was made public, the detainees were already being transported to the airport and loaded onto planes.

67. Those flights took off quickly and, despite this Court's order to return individuals on the flights who were being removed pursuant to the AEA, the planes continued to El Salvador where the individuals were promptly detained in that country's notorious Terrorism Confinement Center ("CECOT").

68. The government also sent eight Venezuelan women to CECOT, presumably pursuant to the Proclamation. However, upon landing, Salvadoran officials informed U.S. officials that CECOT does not imprison women. The government returned the eight Venezuelan women to the United States, along with a Nicaraguan man whom they also attempted to send to CECOT.

69. Petitioners received no advance notice of the basis for their removal. Neither Petitioners nor their attorneys were told that they had been designated "alien enemies." They were not told that they could challenge that designation. Nor were they given an opportunity to do so. They were not even told where the plane was going when they boarded.

70. It later emerged that Respondents had a notice form asserting that an individual is an "alien enemy" and stating that they are "not entitled to a hearing, appeal, or judicial review of this notice and warrant of apprehension and removal." But the CECOT Subclass received no such notice. Nor did their lawyers.

71. It also emerged that Respondents used a checklist to identify alleged TdA members. The checklist gave points for certain characteristics. Eight points meant the individual was "verified" as TdA. The checklist included characteristics such as "subject has tattoos denoting membership/loyalty to TDA" and "subject possesses written rules, constitution, membership certificates, bylaws, etc. indicating . . . membership of or allegiance to TDA."

72. Whether most (or perhaps all) of the class members lack ties to TdA remains to be seen, because the government secretly rushed the men out of the country and has provided Petitioners with no information about the class. But evidence since the flights on March 15 increasingly shows that many members of the CECOT Subclass removed to El Salvador are not "members" of TdA as is required to fall within the Proclamation; many have no ties to TdA at all.

73. Respondents' errors are unsurprising because the methods they employ in the checklist are flawed. For example, the checklist relies on indicators like tattoos or other iconography, despite the fact that TdA does not have common tattoos or symbols. It also relies on possessing an official "indicia" of the organization, like membership certificate or written rules—but the government's own declarants have conceded that TdA is "decentralized" and "loosely organized."

74. These mistakes are devastating. Individuals who are wrongly designated are deported to El Salvador's notorious CECOT prison, as has already occurred to a number of class

members. Respondents have repeatedly taken the position that they cannot or will not take any meaningful steps to facilitate the return of individuals from CECOT.

75. Since March 15, Respondent DOD has operated at least one flight transporting individuals from the United States to CECOT in El Salvador. Several of those individuals were alleged to be affiliated with TdA.

76. Respondents have custody or constructive custody over the individuals designated under the AEA, including those detained at CECOT. Respondents are responsible for the restraints on the liberty of these individuals.

77. Individuals detained at CECOT are detained at the behest of Respondents, and Respondents are paying El Salvador millions of dollars to detain them, as Respondent Secretary Rubio has publicly explained.

78. Respondents are outsourcing part of the United States' prison system to El Salvador. Respondent Secretary Noem has publicly described the transfer of U.S. residents to CECOT as "one of the tools" in the United States' "toolkit" "that we will use if you commit crimes against the American people."

79. Upon information and belief, Respondents are aware that the Salvadoran government mistreats and tortures individuals detained in CECOT.

80. Respondents are attempting to deliberately prevent individuals designated under the AEA, including individuals detained at CECOT, from seeking judicial review.

81. Respondents have also taken the position that noncitizens subject to the Proclamation are not be afforded credible fear interviews, nor will claims for protection under the Convention Against Torture ("CAT") be recognized.

82. Petitioners obtained a TRO against Respondents' unlawful action from this Court on March 15. Respondents sought a stay of the TRO in the D.C. Circuit. The D.C. Circuit denied the motions for stay in a per curiam opinion. *J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682 (D.C. Cir. Mar. 26, 2025). Judge Henderson, concurring, found that the orders were appealable but that Respondents had failed to establish a likelihood of success on the merits because, in her preliminary view, that the AEA's statutory predicates of "invasion" and "predatory incursion" were not met. *Id.* at *1–13 (Henderson, J., concurring). Judge Millett, also concurring, wrote that the order was not appealable and that if the court were to reach the merits, Respondents were unlikely to prevail on their jurisdictional arguments and that the balance of equities weighed against Respondents. *Id.* at *13–31 (Millett, J., concurring). Judge Walker dissented, acknowledging that Petitioners had a right to contest their designation as enemy aliens under the Proclamation but contending that those claims must be brought in habeas in the district of confinement. *Id.* at *31–40 (Walker, J., concurring).

83. Respondents then sought a stay in the Supreme Court. The Court held that "AEA detainees must receive notice after the date of this order that they are subject to removal under the Act . . . within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs." *Trump v. J.G.G.*, No. 24A931, 2025 WL 1024097, at *2 (U.S. Apr. 7, 2025).

84. Despite the Supreme Court's clear instructions, Respondents again attempted to remove individuals under the AEA with inadequate process. On April 16, within hours of a district court in the Northern District of Texas denying a TRO and deferring decision on class certification, the government gave detainees a Bluebonnet Detention Center in Texas an English-only form, not provided to any attorney, which nowhere mentioned the right to contest the

designation or removal, much less explained how detainees could do so. ICE officers told detainees that they would be removed within 24 hours.

85. Petitioners' counsel sought relief at the Fifth Circuit and the Supreme Court. Petitioners' counsel also sought relief in this court, in the form of a request to expedite their TRO regarding notice. This Court held a hearing in which Respondents stated that they would not remove anyone that same day, but Respondents reserved the right to remove people under the AEA the following day.

86. At 12:51 a.m. EDT on Saturday, April 19., the Supreme Court directed the government not to remove any member of the putative class of detainees from the United States until further order of the Court.

87. On April 23, 2025, Respondents submitted a declaration in the Southern District of Texas, under seal, with information about the notice process that the government had for individuals designated for removal under the AEA. *See* Cisneros Decl., *J.A.V. v. Trump*, No. 1:25-cv-072 (S.D. Tex. filed Apr. 23, 2025), ECF No. 45, Exhibit D. That declaration and its accompanying exhibit were unsealed the next day. Oral Order, *J.A.V. v. Trump*, No. 1:25-cv-072 (S.D. Tex. Apr. 24, 2025). The declaration states that individuals are given 12 hours' notice ahead of scheduled removal and that if they express an intent to file a habeas petition, they are given 24 hours to actually file that petition. Cisneros Decl. ¶ 11. The notice process is patently inadequate as a matter of due process.

CLASS ALLEGATIONS

88. Petitioners and Plaintiffs bring this action under Federal Rules of Civil Procedure 23(a) and 23(b)(2) on behalf of themselves and a class of all other persons similarly situated.

89. This Court has already certified a class 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."

90. Petitioners and Plaintiffs seek to amend the class definition to: "All noncitizens who have been, are or will be subject to the March 2025 Presidential Proclamation entitled 'Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua' and/or its implementation."

91. Petitioners further seek to certify the following subclasses under Federal Rules of Civil Procedure 23(a) and 23(b)(2):

a. "CECOT Subclass": All noncitizens in custody at the Terrorism Confinement Center ("CECOT") in El Salvador who were, are, or will be subject to the March 2025 Presidential Proclamation entitled "Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren De Aragua" and/or its implementation.

b. "Criminal Custody Subclass": All noncitizens in criminal custody who were, are, or will be subject to the March 2025 Presidential Proclamation entitled "Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren De Aragua" and/or its implementation.

92. Petitioners and Plaintiffs, together, seek to represent the class, and seek injunctive and declaratory relief for Claims I–VIII, as specified below.

93. Petitioners Frengel Reyes Mota, Andry Jose Hernandez Romero, J.A.B.V., M.A.O.R., G.A.A.A., and M.R.M. are currently detained in CECOT and also seek to represent

the CECOT Subclass. They seek habeas, injunctive, and declaratory relief for Claims I–XIII, as specified below.

94. Petitioner T.C.I. is currently detained in criminal custody and also seeks to represent the Criminal Custody Subclass. He seeks habeas, injunctive, and declaratory relief for Claims I–IX, as specified below, in addition to Claims X–XIII, as specified below, insofar as the Criminal Custody Subclass face an imminent risk of removal and detention at CECOT or a facility with equivalent conditions.

95. Plaintiffs are the original Plaintiffs in *J.G.G. v. Trump*: J.G.G., G.F.F., J.G.O, W.G.H., and J.A.V. Because Plaintiffs have filed habeas actions in their districts of confinement and do not seek relief in this Court through the writ of habeas corpus, they continue to be designated as "Plaintiffs," not "Petitioners." Among other things, Plaintiffs continue to seek—as a matter of due process—meaningful notice of the government's intent to remove them. *See J.G.G. v. Trump*, No. 24A931, 2025 WL 1024097, at *2 (U.S. Apr. 7, 2025) (per curiam) (due process requires government to provide detainees notice that they are subject to removal "within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue"). Because this claim is a precondition to the effective exercise of habeas rights, it lies outside of habeas. In addition, Plaintiffs continue to advance their original claims in equity and under the Administrative Procedure Act. *See* Claims, *infra*.

96. The proposed class and subclasses satisfy the requirements of Rule 23(a) and Rule 23(b)(2).

97. The proposed class and both subclasses satisfy the requirements of Rule 23(a)(1) because they are so numerous that joinder of all members is impracticable. Besides the five originally named petitioners who were nearly removed on March 15, 2025, there are at least 137

individuals were actually removed to the CECOT prison on March 15 pursuant to the AEA. After those removals, on March 18, 2025, the government identified 54 members of TdA in detention, 32 in criminal custody and 172 on its nondetained docket. That means there were roughly nearly 400 people in the entire class as of mid-March 2025, of whom at least 137 were in the CECOT subclass and 32 in Criminal Custody subclass. The government also confirmed that it continues to monitor and identify more TdA members. On April 18, 2025, the government attempted to remove dozens more Venezuelan men pursuant to the AEA.

98. Joinder is also impracticable because class members are largely detained and unrepresented, in addition to being geographically spread out. Joinder is also impracticable because many in the proposed class and subclasses are pro se, indigent, have limited English proficiency, and/or have a limited understanding of the U.S. judicial system. Despite over 130 subclass members at CECOT, Respondents have not provided information about the individuals detained there and are holding them incommunicado, without any access to the outside world, let alone the ability to communicate with any existing or potential counsel. Due to their imprisonment and isolation from the world, the CECOT subclass members cannot practically bring their own challenges. Similarly, Respondents will not provide information about any of the class members in the United States, even to their immigration counsel. Because of the swift timeline for notice and removals, class and subclass members are not able to effectively seek judicial review on an individual basis.

99. The proposed class and both subclasses satisfy the commonality requirements of Rule 23(a)(2). The members of the proposed class and subclasses are subject to a common practice: designation under the Proclamation and either the threat or actual summary removal pursuant to the AEA. The suit raises at least one question of law common to the entire class:

what notice and process is due for those who are designated under the Proclamation. The suit also raises other questions of law common to members of the proposed class and both subclasses, including whether the Proclamation and its implementation violate the AEA, the INA, and the statutory protections for asylum seekers. Moreover, the subclasses share common questions of law and fact regarding the conditions of confinement at CECOT, and whether their current or imminent imprisonment there violates the Fifth, Sixth, and Eighth Amendments.

100. The proposed class and both subclasses satisfy the typicality requirements of Rule 23(a)(3), because the claims of the representative Plaintiffs and Petitioners are typical of the claims of the class. Each proposed class member, including the Plaintiffs, has experienced the same principal injury (inability to challenge their designation), based on the same government practices (the implementation of the Proclamation without meaningful notice), which is unlawful as to the entire class. Each proposed CECOT subclass member, including the proposed CECOT subclass representatives, Frengel Reyes Mota, Andry Jose Hernandez Romero, J.A.B.V., M.A.O.R., G.A.A.A., and M.R.M., has experienced or faces the same principal injury (unlawful removal to CECOT), based on the same government practice (the Proclamation and its implementation), which is unlawful as to the entire subclass because it violates the AEA, the INA, the APA, and various provisions of the Constitution. Similarly, each proposed Criminal Custody subclass member, including the proposed Criminal Custody subclass representative, T.C.I., also faces the same principal injury (imminent removal to CECOT), based on the same government practice (the Proclamation and its implementation), which is unlawful as to the entire subclass because it violates the AEA, the INA, the APA, and various provisions of the Constitution.

101. The proposed class and both subclasses satisfy the adequacy requirements of Rule 23(a)(4). The representative Plaintiffs and Petitioners seek the same relief as the other members of the class, including a meaningful procedure for notice and opportunity to be heard that comports with due process. The representative Petitioners seek the same relief as the other members of both subclasses—among other things, an order declaring the Proclamation unlawful and an injunction preventing enforcement of the Proclamation and to facilitate their return to the United States. In defending their rights, Plaintiffs and Petitioners will defend the rights of all proposed class members and subclass members fairly and adequately.

102. Both the class and subclasses are represented by experienced attorneys from the American Civil Liberties Union and the Democracy Forward Foundation. Proposed Class Counsel have extensive experience litigating class action lawsuits and other complex systemic cases in federal court on behalf of noncitizens.

103. The class and subclasses also satisfy Rule 23(b)(2). Respondents have acted (or will act) on grounds generally applicable to the class and subclasses by subjecting them to summary removal under the Proclamation rather than affording them the protection of immigration laws. Injunctive and declaratory relief is therefore appropriate with respect to the class as a whole. Habeas, injunctive and declaratory relief is also appropriate with respect to both subclasses as a whole.

HARM TO PLAINTIFFS AND PETITIONERS

104. Countless Venezuelans fear imminent removal under the Proclamation based on flimsy allegations that they will have no change to rebut. And named Plaintiffs J.G.G., J.A.V., G.F.F., W.G.H. and J.G.O. all fear removal under the Proclamation because the government has previously attempted to remove them as alien enemies. While the named Plaintiffs as of today

have obtained temporary relief in other proceedings, that relief is temporary and in the absence of it, they are at imminent risk of unlawful removal.

105. For the Plaintiffs, Petitioners, and putative class members who have not yet been removed to El Salvador, they face serious harm if they are removed to El Salvador, where they will be subject to egregious conditions at CECOT. Many Plaintiffs and Petitioners also fear return to Venezuela, where they have a well-founded fear of persecution.

106. Petitioner T.C.I. also fears removal under the Proclamation because the government has previously pressured him to sign a paper stating that he was a member of Tren de Aragua and subject to removal. He has not obtained any temporary relief and is at imminent risk of unlawful removal.

107. Petitioner T.C.I. also fears removal to Venezuela, where he will be targeted by gang members, as with many putative subclass members.

108. Petitioners Frengel Reyes Mota, Andry Jose Hernandez Romero, J.A.B.V., M.A.O.R., G.A.A.A., and M.R.M. are already facing serious harm after being removed to El Salvador, where they are currently subject to egregious conditions at CECOT.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Ultra Vires, Violation of 50 U.S.C. § 21
(Class and Subclasses against All Respondents)

109. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

110. The AEA does not authorize the removal of noncitizens from the United States absent a "declared war" or a "perpetrated, attempted, or threatened" "invasion or predatory incursion" into the United States by a "foreign nation or government." *See* 50 U.S.C. § 21. The

Proclamation mandates Petitioners' and Plaintiffs' removal under the AEA where those preconditions have not been met, and Petitioners imprisoned at CECOT have already been removed under the AEA where those preconditions were not met.

111. The AEA also does not authorize the removal of noncitizens from the United States unless they "refuse or neglect to depart" from the United States. *See* 50 U.S.C. § 21. The Proclamation mandates Petitioners' and Plaintiffs' removal under the AEA where those preconditions have not been met, and Petitioners have been removed under the AEA where those preconditions were not met.

112. The AEA Process, which was purportedly established pursuant to the authority of 50 U.S.C. § 21, was not authorized by that law.

113. The application of the AEA Process to Petitioners and Plaintiffs is therefore ultra vires.

114. The application of the AEA Process to Petitioners and Plaintiffs is contrary to law. *See* 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

Violation of 8 U.S.C. § 1101, *et seq.*
(Class and Subclasses against All Respondents)

115. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

116. The INA, 8 U.S.C. § 1101, *et seq.*, sets out the sole mechanisms established by Congress for the removal of noncitizens.

117. The INA provides that a removal proceeding before an immigration judge under 8 U.S.C. § 1229a is "the sole and exclusive procedure" by which the government may determine

whether to remove an individual, "[u]nless otherwise specified" in the INA. 8 U.S.C. § 1229a(a)(3).

118. The AEA Process creates an alternative removal mechanism outside of the immigration laws set forth by Congress in Title 8.

119. The INA's "exclusive procedure" and statutory protections apply to any removal of a noncitizen from the United States, including removals authorized by the AEA. Because the AEA Process provides for the removal of Petitioners and Plaintiffs without the procedures specified in the INA, it violates 8 U.S.C. § 1229a and the INA.

120. As a result, the application of the AEA to Petitioners and Plaintiffs, which will result or has resulted in their removal from the United States, is contrary to law. See 5 U.S.C. § 706(2)(A).

121. In addition, by refusing to grant Petitioners and Plaintiffs access to the procedures specified in the INA, Respondents have withheld and unreasonably delayed actions mandated by the statute. 5 U.S.C. § 706(1).

THIRD CLAIM FOR RELIEF

Violation of 8 U.S.C. § 1158, Asylum
(Class and Subclasses against All Respondents)

122. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

123. The INA provides, with certain exceptions, that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply

for asylum in accordance with this section or, where applicable, section 1225(b) of this title." 8 U.S.C. § 1158(a)(1).

124. Respondents' application of the AEA Process to Petitioners and Plaintiffs prevents them from applying for asylum in accordance with 8 U.S.C. § 1158(a)(1), and is therefore contrary to law. *See* 5 U.S.C. § 706(2)(A).

FOURTH CLAIM FOR RELIEF

Violation of 8 U.S.C. § 1231(b)(3), Withholding of Removal
(Class and Subclasses against All Respondents)

125. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

126. The "withholding of removal" statute, INA § 241(b)(3), *codified at* 8 U.S.C. § 1231(b)(3), bars the removal of noncitizens to a country where it is more likely than not that they would face persecution.

127. Respondents' AEA Process and regulations violate the withholding of removal statute because they do not provide adequate safeguards to ensure that Petitioners and Plaintiffs are not returned to a country where it is more likely than not that they would face persecution. As a result, Respondents' actions against Petitioners and Plaintiffs are contrary to law. *See* 5 U.S.C. § 706(2)(A).

128. In addition, by refusing to grant Petitioners and Plaintiffs the procedural protections to which they are entitled, Respondents have withheld and unreasonably delayed actions mandated by the statute. 5 U.S.C. § 706(1).

FIFTH CLAIM FOR RELIEF

Violation of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), codified at 8 U.S.C. § 1231 note
(Class and Subclasses against All Respondents)

129. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

130. FARRA prohibits the government from returning a noncitizen to a country where it is more likely than not that he would face torture.

131. Respondents' AEA Process and regulations violate FARRA because they do not provide adequate safeguards to ensure that Petitioners and Plaintiffs are not returned to a country where it is more likely than not that they would face torture. As a result, Respondents' actions against Petitioners and Plaintiffs are contrary to law. *See* 5 U.S.C. § 706(2)(A).

132. In addition, by refusing to grant Petitioners and Plaintiffs the procedural protections to which they are entitled, Respondents have withheld and unreasonably delayed actions mandated by the statute. 5 U.S.C. § 706(1).

SIXTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)
(Class and Subclasses against All Respondents except Respondent Trump)

133. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

134. The APA provides that courts "shall . . . hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion." 5 U.S.C. § 706(2)(A).

135. Respondents' actions are arbitrary and capricious. Respondents have failed to consider relevant factors in applying the AEA Process, including the risk of torture and other inhumane treatment at CECOT, and Venezuelans' fear of persecution and torture in their home country. Respondents also relied on factors Congress did not intend to be considered, and offered no sufficient explanation for their decision to remove them from this country.

136. The subjection of Petitioners and Plaintiffs to the AEA Process is arbitrary and capricious because it also departs from existing agency policies prohibiting the return of individuals who fear persecution or torture, without providing a reasoned explanation for departing from these policies.

SEVENTH CLAIM FOR RELIEF

***Ultra Vires*, Violation of 50 U.S.C. § 22**
(Class and Subclasses against All Respondents)

137. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

138. The APA provides that courts "shall . . . hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

139. The AEA requires that noncitizens whose removal is authorized by the AEA, unless "chargeable with actual hostility, or other crime against the public safety," be allowed the full time stipulated by treaty to depart or a reasonable time in which to settle their affairs before departing. *See* 50 U.S.C. § 22. The Proclamation denies Petitioners and Plaintiffs any time under Section 22 to settle their affairs, because it declares everyone subject to the Proclamation to be "chargeable with actual hostility" and to be a "danger to public safety," without any kind of individualized determination.

140. The AEA Process thus contravenes 50 U.S.C. § 22 and is *ultra vires*.

141. The application of the AEA Process to Petitioners and Plaintiffs is contrary to law. *See* 5 U.S.C. § 706(2)(A).

EIGHTH CLAIM FOR RELIEF

Violation of Due Process Under the Fifth Amendment (Class and Subclasses against All Respondents)

142. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

143. The Due Process Clause of the Fifth Amendment provides in relevant part that: "No person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

144. In denying Petitioners and Plaintiffs adequate notice and meaningful procedural protections to challenge their removal, the Proclamation violates due process.

145. The Proclamation also denies Petitioners and Plaintiffs the opportunity to voluntarily depart and any time to settle their affairs before departing and thus violates the due process.

NINTH CLAIM FOR RELIEF

Violation of Habeas Corpus (Subclasses against All Respondents)

146. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

147. Detainees have the right to file petitions for habeas corpus to challenge the legality of their detention and raise other claims related to their detention or to the basis for their removal.

148. The ongoing or imminent detention of Petitioners under the Alien Enemies Act has violated, continues to violate, and will violate their right to habeas corpus. *See* U.S. Const. art. I, § 9, cl. 2 (Suspension Clause); 28 U.S.C. § 2241.

TENTH CLAIM FOR RELIEF

Ultra Vires, Post-Removal Imprisonment in Violation of 50 U.S.C. § 21
(Subclasses against All Respondents)

149. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

150. When the AEA's conditions have been met, the AEA authorizes a series of actions the executive branch may take with respect to alien enemies residing in the United States: in particular, alien enemies are liable to be "apprehended, restrained, secured, and removed." 50 U.S.C. § 21. But the AEA does not authorize the detention of alien enemies *after* they have been removed from the United States.

151. The ongoing or imminent imprisonment of Petitioners in El Salvador, following their removal, contravenes the AEA and is *ultra vires*.

152. The ongoing or imminent imprisonment of Petitioners in El Salvador, following their removal, is contrary to law. *See* 5 U.S.C. § 706(2)(A).

ELEVENTH CLAIM FOR RELIEF

Punitive Civil Detention in Violation of the Fifth Amendment
(Subclasses against All Respondents)

153. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

154. Detention under the auspices of the AEA, like other forms of immigration detention, is civil detention. Civil detention is subject to due process constraints and must therefore be justified by a regulatory, nonpunitive purpose. *See Bell v. Wolfish*, 441 U.S. 520, 535, 538-39 (1979). Those held in such detention have a due process right not to be subjected to any condition, practice, or policy that constitutes punishment.

155. Respondents are detaining or will imminently detain Petitioners at CECOT for the purpose of punishment and with the expressed intent to punish.

156. Respondents have identified no legitimate reason for transferring and holding detainees at the notorious CECOT prison in El Salvador, other than to deter future migration to the United States, induce self-deportation, and coerce people into giving up claims and accepting deportation. These are impermissible justifications for civil immigration detention.

157. Respondents' ongoing or imminent detention of Petitioners at CECOT also subjects them to punitive conditions that violate their due process rights as civil detainees. *See Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).

158. Respondents' ongoing or imminent detention of Petitioners at CECOT subjects them to harsher detention conditions than they would face in U.S. prisons and immigration detention facilities—hallmarks of punitive detention.

159. For these reasons, detention at CECOT constitutes unlawful punishment, in violation of the Fifth Amendment of the U.S. Constitution.

TWELFTH CLAIM FOR RELIEF

Criminal Punishment in Violation of the Fifth and Sixth Amendments
(Subclasses against All Respondents)

160. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

161. Imprisonment at CECOT, based on unproven accusations of criminal conduct, constitutes criminal punishment in violation of the Fifth and Sixth Amendments. Respondents' intent to criminally punish Petitioners is plain from the circumstances of their confinement at CECOT and from Respondents' own statements. Hallmarks of criminal punishment include a

finding that a person committed acts in violation of a criminal law, the stigma inherent in such a determination, and a resulting deprivation of liberty.

162. Respondents have made or will imminently make summary determinations that Petitioners are "terrorists" and members of a "criminal organization," with no due process.

163. Senior U.S. government officials, including President Trump, have made statements reiterating these accusations and conclusory findings that Petitioners are "criminals," making their intent to punish clear and amplifying the resulting stigma.

164. Respondents have deprived or will imminently deprive Petitioners of their liberty, subjecting them to criminal detention at CECOT in some of the most punitive conditions imaginable.

165. The Fifth and Sixth Amendments guarantee fundamental protections in connection with criminal punishment, including the right to notice of the government's allegations, the right to counsel, the right to trial by a jury, the right to proof beyond a reasonable doubt, and the protection against double jeopardy.

166. Respondents have not afforded Petitioners any of these protections, despite subjecting them to ongoing or imminent criminal punishment.

167. By the actions described above, Respondents have denied or will imminently deny Petitioners the process they are due with regard to their ongoing seizure and detention, in violation of the Due Process Clause of the Fifth Amendment.

168. By the actions described above, Respondents have denied or will imminently deny Petitioners the fundamental protections of the Sixth Amendment.

169. For these reasons, the ongoing or imminent imprisonment of Petitioners at CECOT constitutes criminal punishment that violates the Fifth and Sixth Amendments.

THIRTEENTH CLAIM FOR RELIEF

Conditions of Confinement in Violation of the Eighth Amendment
(Subclasses against All Respondents)

170. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

171. The Eighth Amendment prohibits cruel and unusual punishment.

172. Under the Eighth Amendment, Respondents must provide for Petitioners' basic human needs, including food, shelter, medical care, and reasonable safety. *DeShaney v. Winnebago County Dept. of Social Svcs*., 489 U.S. 189, 199-200 (1989). Respondents must also avoid the use of excessive physical force.

173. In subjecting Petitioners to ill treatment, unsafe conditions, inadequate subsistence, inadequate medical care, and excessive physical force at CECOT, Respondents are violating or will imminently violate Petitioners' Eighth Amendment rights to decent and humane treatment in criminal confinement.

PRAYER FOR RELIEF

WHEREFORE, Petitioners and Plaintiffs respectfully pray this Court to:

a. Certify this action as a class action on behalf of the proposed class and subclasses, appoint the Petitioners and Plaintiffs as class representatives; Petitioners as subclass representatives; and undersigned counsel as class counsel;

b. Order Respondents to provide notice of AEA designation to Plaintiffs, Petitioners, and class counsel, and an opportunity to challenge such designation at least 30 days prior to the removal date;

c. Grant a writ of habeas corpus that (1) enjoins Respondents from removing Petitioners pursuant to the Proclamation or, in the event they have already been removed to CECOT, that orders Respondents to facilitate their return to the United States; and (2) enjoins Respondents from detaining Petitioners or otherwise regulating them pursuant to the Proclamation;

d. Enjoin Respondents from removing Petitioners and Plaintiffs from the United States pursuant to the Proclamation;

e. Enjoin Respondents from detaining or otherwise regulating Petitioners and Plaintiffs pursuant to the Proclamation;

f. Declare unlawful the Proclamation and the AEA Process, including detention of Petitioners at CECOT;

g. Order Respondents to facilitate the return of the CECOT Subclass to the United States;

h. Award Plaintiffs' counsel reasonable attorneys' fees under the Equal Access to Justice Act, and any other applicable statute or regulation; and

i. Grant such further relief as the Court deems just, equitable, and appropriate.

Dated: April 24, 2025

Respectfully submitted,

/s/ *Lee Gelernt*

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EXHIBIT B

DECLARATION OF JUANITA GOEBERTUS,
DIRECTOR, AMERICAS DIVISION, HUMAN RIGHTS WATCH

I, Juanita Goebertus, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am the Director of the Americas Division of Human Rights Watch and have worked with the organization since 2022. I hold BAs in Law and Political Science from the Universidad de los Andes (Colombia) and an LLM from Harvard Law School. I oversee Human Rights Watch's work on El Salvador and have traveled to the country several times, most recently in 2024. I provide this declaration based on my personal knowledge and experience.
2. Individuals deported pursuant to the 1789 Alien Enemies Act have been sent to the Center for Terrorism Confinement, the Centro de Confinamiento del Terrorismo (CECOT) in Tecoluca, El Salvador. The prison was first announced for a capacity of 20,000 detainees. The Salvadoran government later doubled its reported capacity, to 40,000. As Human Rights Watch explained to the UN Human Rights Committee in July 2024, the population size raises concerns that prison authorities will not be able to provide individualized treatment to detainees, thereby contravening the UN Standard Minimum Rules for the Treatment of Prisoners.
3. People held in CECOT, as well as in other prisons in El Salvador, are denied communication with their relatives and lawyers, and only appear before courts in online hearings, often in groups of several hundred detainees at the same time. The Salvadoran government has described people held in CECOT as "terrorists," and has said that they "will never leave." Human Rights Watch is not aware of any detainees who have been released from that prison. The government of El Salvador denies human rights groups

access to its prisons and has only allowed journalists and social media influencers to visit CECOT under highly controlled circumstances. In videos produced during these visits, Salvadoran authorities are seen saying that prisoners only "leave the cell for 30 minutes a day" and that some are held in solitary confinement cells, which are completely dark.

4. While CECOT is likely to have more modern technology and infrastructure than other prisons in El Salvador, I understand the mistreatment of detainees there to be in large part similar to what Human Rights Watch has documented in other prisons in El Salvador, including Izalco, La Esperanza (Mariona) and Santa Ana prisons. This includes cases of torture, ill-treatment, incommunicado detention, severe violations of due process and inhumane conditions, such as lack of access to adequate healthcare and food.

5. Prison conditions in El Salvador should be understood within the context of the country's three-year-long state of emergency, which has suspended constitutional due process rights. Since the state of emergency was instituted in March 2022, security forces report detaining 85,000 people (the equivalent of 1.4% of the country's population). Although the government has denied Human Rights Watch information on the number of detainees it holds and its prison capacity, Human Rights Watch estimates based on official data that there are 109,000 people held in prisons with an official capacity for 70,000. Since the state of emergency was instituted, over 350 people have died in El Salvador's prisons according to Salvadoran human rights groups, including the organization Cristosal, which jointly authored our December 7, 2022 report on El Salvador's prisons titled, "We Can Arrest Anyone We Want" (hereinafter "We Can Arrest Anyone").[1]

[1] Human Rights Watch, *"We Can Arrest Anyone We Want": Widespread Human Rights Violations Under El Salvador's "State of Emergency"*, WWW.HRW.ORG, Dec. 7, 2022, https://www.hrw.org/report/2022/12/07/we-can-arrest-anyone-we-want/widespread-human-rights-violations-under-el#3683 (last visited Mar. 19, 2025).

6. In July 2024, Human Rights Watch published a report on abuses committed against children during the state of emergency, titled "Your Child Does Not Exist Here." Over 3,300 children have been detained, many without any ties to gang activity or criminal organizations. Human Rights Watch documented 66 cases of children subjected to torture, ill-treatment and appalling conditions, including at times extreme overcrowding, unhygienic conditions, and inadequate access to food and medical care while in custody. In February, the Legislative Assembly approved a law ordering the transfer of children detained for organized crime offenses to the country's adult prison system, exposing them to a heightened risk of abuse and violating international juvenile justice standards.
7. For "We Can Arrest Anyone," and in "Your Child Does Not Exist Here," Human Rights Watch has interviewed more than 30 people released from El Salvador's prisons, including children, and dozens of people who have relatives in jail.[2] These interviews were conducted in person in several states in El Salvador or by telephone and corroborated by additional research and media reports.
8. One of the people we spoke with was an 18-year-old construction worker who said that police beat prison newcomers with batons for an hour. He said that when 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 it broke a rib.

[2] Human Rights Watch, "*Your Child Does Not Exist Here": Human Rights Abuses Against Children Under El Salvador's "State of Emergency"* , WWW.HRW.ORG, Jul. 16, 2024, https://www.hrw.org/report/2024/07/16/your-child-does-not-exist-here/human-rights-abuses-against-children-under-el (last visited Mar. 19, 2025).

9. The construction worker said the cell he was imprisoned in was so crowded that detainees had to sleep on the floor or standing, a description often repeated by people who have been imprisoned in El Salvador.
10. Another detainee we interviewed was held for two days in a police lock-up with capacity for 25 people, but he said that when he arrived, there were over 75 prisoners. He slept on the floor next to "the bathroom," a hole in the ground that smelled "terrible." He was sent in a group of other prisoners to Izalco prison on the third day, where they were ordered the group to take off their clothes. They were forced to kneel on the ground naked looking downwards for four hours in front of the prison's gate. Guards took the group to a room with five barrels full of water with ice, he said. Fifteen guards forced him and others to go into the barrels for around two hours in total, as they questioned them. The detainee was forced into a barrel "around 30 times," and was kept there for about a minute each time. Guards forced his head under water so he could not breathe. "I felt I was drowning," he said. Guards repeatedly insulted them, calling them "dogs" and "scum" and saying they would "pay for what [they] had done."
11. A third detainee held in prison in June 2022 described being sent to what he described as a "punishment cell." He said officers moved him and others there to "make room for other detainees." The new cell was constantly dark, detainees had to sleep standing due to overcrowding, and there was no regular access to drinking water.
12. For "We Can Arrest Anyone," Human Rights Watch and Cristosal gathered evidence of over 240 cases of people detained in prisons in El Salvador with underlying health conditions, including diabetes, recent history of stroke, and meningitis. Former detainees often describe filthy and disease-ridden prisons. Doctors who visited detention sites told

us that tuberculosis, fungal infections, scabies, severe malnutrition and chronic digestive issues were common.

13. Out of the estimated 350 detainees who have died in El Salvador's prisons, we documented 11 of these cases in detail in "We Can Arrest Anyone", based on interviews with victims' relatives, medical records, analysis by forensic experts, and other evidence.
14. In one case, a person who died in custody was buried in a mass grave, without the family's knowledge. This practice could amount to an enforced disappearance if authorities intentionally concealed the fate or whereabouts of the detainee.
15. In at least two other cases, officials appear to have failed to provide detainees the daily medication they required to manage underlying health conditions such as diabetes.
16. In at least four of the eleven cases, photographs of the bodies show bruises. Members of the Independent Forensic Expert Group (IFEG) of the International Rehabilitation Council for Torture Victims (IRCT), who reviewed the photos and other evidence in two of the cases, told Human Rights Watch and Cristosal that the deaths were "suspicious" given that the bodies "present multiple lesions that show trauma that could have been caused by torture or ill-treatment that might have contributed to their deaths while in custody."
17. In a separate Human Rights Watch report from February 2020, titled "Deported to Danger," Human Rights Watch investigated and reported on the conditions in Salvadoran prisons experienced by Salvadoran nationals deported by the United States.[3] In interviews with deportees and their relatives or friends, we collected accounts of three

[3] Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, WWW.HRW.ORG, Feb. 5, 2020, https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and (last visited Mar. 19, 2025).

male deportees from the United States who said they were beaten by police or soldiers during arrest, followed by beatings during their time in custody, which lasted between three days to over a year. During their time in prison, two of these individuals reported being kicked in the face and testicles. A third man described being kicked by guards in his neck and abdomen, after which he sustained injuries requiring an operation for a ruptured pancreas and spleen, month-long hospitalization, and 60 days of post-release treatment.

Executed on this 19th day of March, 2025 in Villa de Leyva, Colombia.

Signed by:
Juanita Goebertus
F2D78A8897CF4A6...

JUANITA GOEBERTUS

EXHIBIT C

Declaration of Dr. Sarah C. Bishop
Risks for Non-Salvadoran Actors Facing Third Country Removal to El Salvador

Introduction

1. I am writing this expert witness report to address human rights abuses in Salvadoran prisons. I am a full professor with tenure at Baruch College, the City University of New York. I was the 2020-2021 Fulbright Scholar to El Salvador during which time I lived and conducted fieldwork in the country; I have since returned to El Salvador each year for fieldwork related to both published and in-process projects about the State of Exception, human rights abuses by state actors, gang activity, and prison conditions.

2. Deportees who are imprisoned in El Salvador are highly likely to face immediate and intentional life-threatening harm at the hands of state actors and a secondary threat of violence from incarcerated gang members.

Expert Qualifications

3. I was the 2020/2021 Fulbright scholar to El Salvador, during which time I lived and worked in the Department of La Libertad consulting with local academics and non-profit personnel to develop a project that chronicles the experiences of individuals affected by gang-, government-, and domestic-based violence, as well as the professional and psychological outcomes for deportees. I have interviewed multiple people who have been deported back to El Salvador after failed asylum claims and have also interviewed personnel from non-profit organizations working to support individuals who had been deported by the United States or by another government.

4. I have published three books on the experiences of refugees and undocumented immigrants in the United States. In 2022, Columbia University Press published my book *A Story to Save Your Life: Communication and Culture in Migrants' Search for Asylum*. The book won the Abraham Brilloff Prize in Ethics and the Oral History Association's Best Book Award in 2023. My book *Undocumented Storytellers: Narrating the Immigrant Rights Movement* was published by Oxford University Press in 2019 and was the winner of the Best Book Award from the American Studies Division of the National Communication Association. *U.S. Media and Migration: Refugee Oral Histories* was published by Routledge in 2016 and won the Sue DeWine Distinguished Scholarly Book Award.

5. I am a migration scholar with a Ph.D. in Intercultural Communication from the University of Pittsburgh (2014). My dissertation was an oral history project analyzing the push factors and migration experiences of 74 refugees living in the United States. I received an M.A. from New York University in 2009 in Media, Culture, and Communication during which I took classes such as "Refugees and IDPs: Protection and Practice." I received a B.A. from the University of Akron in 2008.

6. I have published numerous articles in peer-reviewed academic journals on the experiences of forced migrants from Central America, including most recently "Hidden in Plain Sight: The In/Visbility of Human Rights in El Salvador's Prisons Under the State of Exception" coauthored with Salvadoran expert Dr. Mneesha Gellmen and forthcoming in *Latin American Research*

Review in 2025; "Beyond the Glowing Headlines: Social Science Analysis of the State of Exception in El Salvador," *Columbia Regional Expert Series,* coauthored with Salvadoran experts Dr. Tom Boerman and Dr. Tommie Sue Montgomery in 2023; "An Illusion of Control: How El Salvador's President Rhetorically Inflates His Ability to Quell Violence," published in *Journalism and Media* in 2023; "'What Does a Torture Survivor Look Like?': Nonverbal Communication in Asylum Interviews and Hearings," published in the *Journal of International & Intercultural Communication* in 2021; "Intercultural Communication, the Influence of Trauma, and the Pursuit of Asylum in the United States," published in the *Journal of Ethnic and Cultural Studies* in 2021; "An International Analysis of Governmental Media Campaigns to Deter Asylum Seekers," published in the *International Journal of Communication* in 2020. All of my books and the articles I have published in academic journals have been subject to peer review by other experts.

7. I regularly give talks about country conditions in El Salvador and the root causes of forced migration, including "Violence for Peace: Authoritarian Justifications of Human Rights Abuses in Central America," to be presented at the Anthropology of Peace, Conflict, and Security Conference in June 2025; "Intergovernmental Criminal History Information Sharing: Justice on Paper, Violence in Practice for Forced Migrants," presented at the Marxe School for International Affairs in March 2025; "Populism, Rhetorical Strategy, and the Regression of Democracy in Central America," presented at Cristosal in San Salvador in February 2023; "Addressing Misinformation and Distortion of Statistics in Country Conditions Research," presented at the International Studies Association in November 2024; "An Illusion of Control: How El Salvador's President Rhetorically Inflates His Ability to Quell Violence," presented at the annual meeting of the American Sociological Association in August 2022; "Health and Safety in El Salvador," presented at the Fulbright Pre-departure Orientations in June 2022, June 2023, and June 2024; and "The Returned: Communication and Culture in the Post-Deportation Lives of Former Asylum Seekers from El Salvador," presented at the annual meeting of the International Association for the Study of Forced Migration in July 2021.

8. I have received several competitive grants for my research on El Salvador, including a 2025 grant from the American Council of Learned Societies (ACLS) and a 2024 grant from the Waterhouse Family Institute to study post-deportation experiences in El Salvador through a family communication approach; a 2022-2023 PSC CUNY Grant for research that documents post-deportation harm in El Salvador; a 2022 grant from the Robert Bosch Stiftung Foundation to travel to El Salvador and meet with investigative journalists and human rights activists for a project about President Nayib Bukele's recent actions against independent media; and a 2018 fellowship from the Institute for the Study of Human Rights at Columbia University to study obstacles to human rights and efforts to promote peace in post-conflict societies including El Salvador.

9. I remain current on events in El Salvador through regularly reading local, national, and international sources including academic and government studies and investigative journalism studies, through frequent conversations with colleagues in the U.S. and El Salvador, and by presenting my research on El Salvador at national and international academic conferences.

10. At Baruch College, I teach classes on migration to the United States and global communication in the Department of Communication Studies, the Macaulay Honors College, and the Masters in International Affairs. I am affiliate faculty in the Department of Black and Latino Studies.

11. My migration research has been recognized for being ethical and applied to real-world contexts: I won the Abraham J. Briloff Prize in Ethics in 2017 and 2023, and the Stanley L. Saxton Applied Research Award in 2018. Moreover, in keeping with the New York State Ethics Commission Reform Act of 2022, I undergo annual ethics training at CUNY.

12. Methodologically, I rely on oral history, ethnography, critical-cultural analysis of governmental communication, and qualitative comparative analysis to conduct my research about country conditions in El Salvador. These are standard and widely used social science methodologies. At Baruch, I am responsible for teaching a graduate level required course on qualitative methods in which I train master's level students in these methods.

13. In 2025 I received $75,000 from the Russell Sage Foundation to continue the project "Recovering the Visibility of Post-Deportation Experiences in El Salvador: A Family Communication Approach" for the years 2025-2027 to involve additional participants who have family members who have been deported under the State of Exception.

Democratic Erosion and Governmental Corruption in El Salvador

14. El Salvador is experiencing a severe democratic decline that threatens the human rights and general safety of the whole population. The 2023 U.S. State Department's Human Rights Reports on El Salvador cites "credible reports of: unlawful or arbitrary killings; enforced disappearance; torture or cruel, inhuman, or degrading treatment or punishment by security forces; harsh and life-threatening prison conditions; arbitrary arrest or detention; serious problems with the independence of the judiciary; arbitrary or unlawful interference with privacy; extensive gender-based violence, including domestic and sexual violence, and femicide; substantial barriers to sexual and reproductive health services access; trafficking in persons, including forced labor; and crimes involving violence targeting lesbian, gay, bisexual, transgender, queer, or intersex persons."[1]

15. President Bukele was discovered through meticulously documented reporting by investigative journalists working for *El Faro* in 2020 to have been negotiating with imprisoned gang leaders who reportedly agreed to a reduction in homicides and electoral support in exchange for additional prison privileges and other benefits for incarcerated gang members.[2] During the weekend of March 25, 2022 there was a record-setting string of around eighty-seven gang-committed homicides across El Salvador that resulted from the unraveling of that secret pact between Bukele and the gangs in what MS-13 called a "betrayal" of Bukele's loyalty. The Monday following the homicides, Bukele successfully called on the Salvadoran Legislative Assembly to pass a State of Exception, which suspends many constitutional protections including due process, drastically increases police and military powers to arrest and imprison suspected gang members, and curtails the right to legal defense.

[1] "El Salvador 2023 Human Rights Report." US Department of State. https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/el-salvador/ p 1.
[2] Carlos Martínez, Óscar Martínez, Sergio Arauz, and Efren Lemus. "Bukele has been negotiating with MS-13 for a reduction in homicides and electoral support." *El Faro.* 6 September 2020. https://elfaro.net/en/202009/el_salvador/24785/Bukele-Has-Been-Negotiating-with-MS-13-for-a-Reduction-in-Homicides-and-Electoral-Support.htm

16. As a result of the government's actions under the current State of Exception, El Salvador currently has the highest incarceration rate in the world.[3]

17. Salvadoran Vice President Félix Ulloa revealed plainly to the *New York Times*, "To these people who say democracy is being dismantled, my answer is yes — we are not dismantling it, we are eliminating it, we are replacing it with something new."[4] The politicized use of all three branches of government to enact and extend the power of the State of Exception disallows any guarantee of justice for Salvadorans against whom the State has acted.

18. The government of El Salvador claims that it has been effective at establishing peace in the country. Americas director at Amnesty International Ana Piquer explained in December 2024, "What the government calls 'peace' is actually an illusion intended to hide a repressive system, a structure of control and oppression that abuses its power and disregards the rights of those who were already invisible—people living in poverty, under state stigma, and marginalization—all in the name of a supposed security defined in a very narrow way."[5]

19. Bukele's director of prisons, Osiris Luna Meza, was indicted by the United States Federal Government for arranging meetings in prison for negotiations with MS-13.[6] As the U.S. Treasury Department reveals, "Osiris Luna Meza (Luna) and Carlos Amilcar Marroquin Chica (Marroquin) [chairman of Bukele's Social Fabric Reconstruction Unit] led, facilitated, and organized a number of secret meetings involving incarcerated gang leaders, in which known gang members were allowed to enter the prison facilities and meet with senior gang leadership. These meetings were part of the Government of El Salvador's efforts to negotiate a secret truce with gang leadership."[7] Luna has also been deemed corrupt by the U.S. Department of Treasury for developing a scheme with another senior Bukele official to embezzle millions of dollars from the prison commissary system.[8]

[3] "El Salvador Opens 40,000-Person Prison as Arrests Soar in Gang Crackdown." *Reuters*. 1 February 2023. https://www.reuters.com/world/americas/el-salvador-opens-40000-person-prison-arrests-soar-gang-crackdown-2023-02-01/#:~:text=SAN%20SALVADOR%2C%20Feb%201%20(Reuters,the%20prison%20population%20to%20soar.
[4] Natalie Kitroeff. "He Cracked Down on Gangs and Rights. Now He's Set to Win a Landslide." New York Times. 2 February 2024. https://www.nytimes.com/2024/02/02/world/americas/el-salvador-bukele-election.html
[5] "El Salvador: A thousand days into the state of emergency. 'Security' at the expense of human rights." Amnesty International. 20 December 2024. https://www.amnesty.org/en/latest/news/2024/12/el-salvador-mil-dias-regimen-excepcion-modelo-seguridad-a-costa-derechos-humanos/
[6] United States District Court. Eastern District of New York. Paragraph 35. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.justice.gov/usao-edny/press-release/file/1569726/download
[7] "Treasury Targets Corruption Networks Linked to Transnational Organized Crime." U.S. Treasury Department. 8 December 2021. https://home.treasury.gov/news/press-releases/jy0519
[8] "Treasury Targets Corruption Networks Linked to Transnational Organized Crime." U.S. Department of the Treasury. 8 December 2021. https://home.treasury.gov/news/press-releases/jy0519

20. In multiple recent documented cases, the Salvadoran government has falsified records, ignored international human rights laws, and detained and prosecuted individuals without evidence to support the ongoing expansion of the State of Exception and indiscriminately punish those who resist or oppose it. As described by Human Rights Watch, "In many cases, detentions appear to be based on the appearance and social background of the detainees, or on questionable evidence, such as anonymous calls and uncorroborated allegations on social media. In these cases, police and soldiers did not show people a search or arrest warrant, and rarely informed them or their families of the reasons for their arrest. A mother who witnessed the detention of her son said that police officers told her, 'We can arrest anyone we want.'"[9]

General Living Conditions in Prison

21. The 2023 U.S. State Department Human Rights Report on El Salvador emphasizes that "Prison conditions *before* the state of exception were harsh and life threatening …The addition of 72,000 detainees under the state of exception exacerbated the problem."[10] Rather than merely being a result of overcrowding, the same U.S. State Department report cites testimonies from released prisoners that show that the life threatening nature of the prison is a result of "systemic abuse in the prison system, including beatings by guards and the use of electric shocks."[11]

22. Salvadoran government officials have directly stated that the dangerous and unsanitary conditions for prisoners taken into custody during the State of Exception are being created intentionally: for example, the U.S. State Department notes that "From the start of the state of exception, the government frequently advertised on social media the overcrowded conditions and lack of adequate food in the prisons as appropriate treatment for gang members."[12] The Directorate General of Penal Centers advertised: "All the suffering these bastards have inflicted on the population, we will make happen to them in the prisons, and we will be very forceful with this. They live without the light of the sun, the food is rationed… they sleep on the floor because that is what they deserve."[13] Paradoxically, this was the same director who was indicted by the United States Federal Government for arranging meetings in prison for negotiations with MS-13,[14] and who has been deemed corrupt by the U.S. Department of Treasury for developing a scheme with another senior Bukele official to embezzle millions of dollars from the prison commissary system, emphasizing the scope of corruption common in prison leadership.[15]

23. In response to international human rights organizations that have raised the alarm about current conditions in El Salvador, President Bukele tweeted "Let all the 'human rights' NGOs know that we are going to destroy these damn murderers and their collaborators, we will throw them in

[9] Human Rights Watch and Cristosal. "We Can Arrest Anyone We Want": Widespread Human Rights Violations Under El Salvador's "State of Emergency." 7 December 2022, https://www.hrw.org/report/2022/12/07/we-can-arrest-anyone-we-want/widespread-human-rights-violations-under-el

[10] "El Salvador 2023 Human Rights Report." US Department of State. https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/el-salvador/ p 7, emphasis added

[11] Ibid., p 5.

[12] "El Salvador 2022 Human Rights Report." https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/ p 6.

[13] Cited in Amnesty International. "Behind the veil of popularity: Repression and regression of human rights in El Salvador." 5 December 2023. https://www.amnesty.org/en/latest/news/2023/12/el-salvador-policies-practices-legislation-violate-human-rights/ p 34.

[14] United States District Court. Eastern District of New York. Paragraph 35. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.justice.gov/usao-edny/press-release/file/1569726/download

[15] "Treasury Targets Corruption Networks Linked to Transnational Organized Crime." U.S. Department of the Treasury. 8 December 2021. https://home.treasury.gov/news/press-releases/jy0519

prison and they will never get out. We don't care about their pitying reports, their prepaid journalists, their puppet politicians, nor their famous 'international community' that never cared about our people."[16]

24. El Salvador's Public Security Minister has confirmed the plan not to release prisoners and claimed that there are 40,000 serial killers in El Salvador. He stated in an interview with CNN in 2024: "Someone who every day killed people, every day raped our girls, how can you change their minds? We are not stupid…In the US, imagine a serial killer in your state, in your community being released by a judge … how would you feel as a citizen? We don't have facts that someone can change a mind from a serial killer … and we have more than 40,000 serial killers in El Salvador."[17]

25. In October 2021 the Salvadoran government declared that information relating to all detained persons would be considered confidential; over 325 complains to the Interamerican Commission on Human Rights show that when family members have requested information about their detained loved ones, "authorities either refused or provided false information about their whereabouts."[18] In a sample of 131 cases, Cristosal 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.[19]

26. During my January 2024 visit to El Salvador, I visited Mariona prison where many informal vendors were set up outside the prison gates selling packets of food, medicine, soap, and clothing to individuals with detained family members. Family members can seek to protect their detained relatives from illness or starvation in prison if their family is able to purchase these expensive packets, which cost $100-$300 per month although the national minimum monthly wage is only $365.[20] However, even families who can afford these packets have no assurance that the resources they try to send will ever reach their loved ones inside the prison; there are reports of prison officials deliberately withholding medicine and food even when it is available,[21] and reports of guards forcing women to do sexual acts in exchange for food and medicine.[22]

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[16] Nayib Bukele. 16 May 2023. https://x.com/nayibbukele/status/1658608915683201030?s=20
[17] David Culver, Abel Alvarado, and Evelio Contreras. "Exclusive: Locking eyes with mass murderers in El Salvador." 13 November 2024 https://www.cnn.com/2024/11/06/americas/el-salvador-inside-cecot-prison/index.html
[18] Amnesty International. "Behind the veil of popularity: Repression and regression of human rights in El Salvador." 5 December 2023. https://www.amnesty.org/en/latest/news/2023/12/el-salvador-policies-practices-legislation-violate-human-rights/ p 29.
[19] Noah Bullock. "The State of Exception in El Salvador: Taking Stock." Testimony before the United States Congress, Tom Lantos Human Rights Commission. 10 December 2024. https://www.youtube.com/watch?v=ChTW-gm-5SI
[20] Mneesha Gellman. "El Salvador voters set to trade democracy for promise of security in presidential election." *The Conversation.* 29 January 2024. https://theconversation.com/el-salvador-voters-set-to-trade-democracy-for-promise-of-security-in-presidential-election-221092
[21] "Testimonios: Sobrevivientes de las Cárceles del Régimen." A weekly series from *El Faro.* https://especiales.elfaro.net/es/testimonios/
[22] "El Silencio no es opción: Investigación sobre las practices de tortura, muerte, y justicia fallida el el regimen de excepción." 10 July 2024. Cristosal Foundation. https://cristosal.org/ES/presentacion-informe-el-silencio-no-es-opcion/

27. A 2024 Report on the Violation of the Right to Health in the Country's Penal Centers from the Human and Community Rights Defense Unit (UNIDEHC) found that upon arrival in prison, detainees under the State of Exception "were received by guards, where many of them were beaten to pressure them to declare which 'gang they belonged to,' and if they refused to say so, they were beaten and tortured more, some convulsed from the beatings they received and others died in these practices, on the first day of transfer."[23] In February 2025, the spokesperson for the organization who produced this report was arbitrarily detained during a raid on the organization's headquarters; Amnesty International concluded his detention was "particularly concerning, as he has been both a witness to and a denouncer of torture in penitentiary centers."[24]

28. The Human and Community Rights Defense Unit (UNIDEHC) also reported in 2024 after a round of interviews with a health professional who worked in a clinic that served some inmates from Mariona prison that inmates were "not provided with medication to treat their diseases that they already suffered from; for example: people with hypertension, diabetes, kidney failure, respiratory problems, among others. They did not receive medication, which caused decompensation and death in some cases. Guards were repeatedly asked for help when someone convulsed or felt ill, but they did not arrive until the following day, or the person's health became more complicated or they died, waiting for help from the prison authorities."[25]

29. Both the 2022 and 2023 U.S. State Department's Human Rights Report on El Salvador state that prison officials repeatedly denied access to the Salvadoran Human Rights Ombudsman's Office, the entity responsible for investigating accusations of human rights abuses in prison.[26]

30. In 2023, Bukele announced the opening of the new "mega-prison" called the *Centro de Confinamiento del Terrorismo* or CECOT. An analysis of the CECOT's design using satellite footage found that if the prison were to reach full supposed capacity of forty thousand, each prisoner would have less than two feet of space in shared cells—an amount the authors point out is less than half the space required for transporting midsized cattle under EU law.[27]

31. The U.S. State Department confirms that prisoners have been held in grossly overcrowded prisons with as many as 80 prisoners held in cells designed for just 12 so that they must sleep standing up.[28]

Systemic Torture as State Policy in Salvadoran Prisons

32. Although El Salvador is a signatory to both the Convention Against Torture and the International Covenant on Civil and Political Rights, Amnesty International has concluded that there is a

[23] Human and Community Rights Defense Unit (UNIDEHC). Violation of the Right to Health in the Country's Penal Centers. 2024. https://heyzine.com/flip-book/9849749093.html#page/1 p 17.
[24] "El Salvador: Repression against human rights defenders and community leaders." Amnesty International 5 March 2025. https://www.amnesty.org/en/documents/amr29/9100/2025/en/
[25]Human and Community Rights Defense Unit (UNIDEHC). Violation of the Right to Health in the Country's Penal Centers. 2024. https://heyzine.com/flip-book/9849749093.html#page/1
[26] "El Salvador 2022 Human Rights Report." U.S. Department of State. https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/ p 4.
[27] Christine Murray, and Alan Smith.. "Inside El Salvador's mega-prison: the jail giving inmates less space than livestock." Financial Times, 6 March 2023. https://www.ft.com/content/d05a1b0a-f444-4337-99d2-84d9f0b59f95.
[28] "El Salvador 2022 Human Rights Report." U.S. Department of State. https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/ p 6.

"systemic use of torture in Salvadoran prisons."[29] The organization notes with concern the three primary characteristics of the crisis: "1) the massive number of human rights violations being committed; 2) the high degree of state coordination in the design and implementation of this measure; and 3) a state response that tends to conceal and minimize these actions, refusing to recognize and diligently investigate the abuses."[30] They confirm that "torture and cruel, inhuman, and degrading treatment have become habitual practice rather than isolated incidents in the prisons."[31]

33. The range of violence occurring inside prisons in El Salvador at the hands of gangs and prison guards is acknowledged in the 2022 and 2023 U.S. State Department's Human Rights Reports on El Salvador; detainees are subject to beatings, waterboarding, and use implements of torture on detainees' fingers to try to force confessions of gang affiliation.[32] Likewise, family members of the detained have been threatened with arrest by security forces to "stop asking questions."[33]

34. A July 2024 report from Cristosal—compiled from 3,643 reports of abuses or rights violations, 110 interviews, case-by-case analyses of 7,742 detainees' experiences—concluded that "Torture has become a state policy, with cruel and inhuman treatment regularly practices in prisons and places of detention."[34]

35. Human Rights Watch conducted 90 interviews about human rights abuses under the State of Exception and published in July 2023 evidence of torture including suffocation, burning, and mock executions against children.[35] The report also found that authorities use abusive language and death threats when making arrests of children who are subjected to human rights violations before, during, and even after their release, and that "In many cases, authorities coerced children into making false confessions to crimes through a combination of abusive plea deals and sometimes mistreatment or torture."[36]

36. An extensive December 2022 investigative report by Human Rights Watch and Cristosal about the State of Exception found that "human rights violations were not isolated incidents by rogue agents. Rather, similar violations were carried out repeatedly and across the country, throughout a period of several months, by both the military and the police."[37]

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[29] Amnesty International. "Behind the veil of popularity: Repression and regression of human rights in El Salvador." 5 December 2023. https://www.amnesty.org/en/latest/news/2023/12/el-salvador-policies-practices-legislation-violate-human-rights/
[30] Ibid.
[31] Amnesty International. "Behind the veil of popularity: Repression and regression of human rights in El Salvador." 5 December 2023. https://www.amnesty.org/en/latest/news/2023/12/el-salvador-policies-practices-legislation-violate-human-rights/ p 33.
[32] "El Salvador 2022 Human Rights Report." U.S. Department of State. https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/ p 5; "El Salvador 2023 Human Rights Report." US Department of State. https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/el-salvador/ p 2, 15.
[33] Ibid.
[34] "El Silencio no es opción: Investigación sobre las practices de tortura, muerte, y justicia fallida el el regimen de excepción." 10 July 2024. Cristosal Foundation. https://cristosal.org/ES/presentacion-informe-el-silencio-no-es-opcion/
[35] Human Rights Watch. "Your Child Does Not Exist Here: Human Rights Abuses Against Children Under El Salvador's 'State of Emergency.'" 16 July 2024. https://www.hrw.org/report/2024/07/16/your-child-does-not-exist-here/human-rights-abuses-against-children-under-el
[36] Ibid. p 2.
[37] Human Rights Watch and Cristosal. "We Can Arrest Anyone We Want": Widespread Human Rights Violations Under El Salvador's "State of Emergency." 7 December 2022, https://www.hrw.org/report/2022/12/07/we-can-arrest-anyone-we-want/widespread-human-rights-violations-under-el; The Minister of Security is determined to see the number of arrests rise. See: Mario Gonzalez. "Security Minister wants to imprison 80,000 gang members." *El Diario de Hoy.* 17 June 2022. https://www.elsalvador.com/noticias/nacional/regimen-de-excepcion-ministro-gustavo-villatoro/968181/2022/

37. In some cases, many inmates are punished if one does not obey the guards' orders. UNIDEHC found in an interview with a health professional who had worked at Mariona prison, "In some cells, when an order of the guards or person was not obeyed, they were punished, some examples are: wetting all the people in the cell including their belongings with high-pressure hoses with ice cold water, invading the cell with tear gas; electric shocks, beatings with objects, confinement in the 'punishment cell,' where there were insects and animals (cockroaches, scorpions and mice)…[and] to deprive the right to food, use of the bathroom, and going out in the sunlight, for many days."[38]

38. Amnesty International confirms that "the grave human rights violations being committed under the state of emergency are systematic in nature due to the widespread and sustained manner in which they are occurring; the level of state organization and planning involving the convergence of the three branches of the state; the impunity and lack of accountability; the lack of transparency and access to information; and the widespread criminalization of poverty, as an aspect of discrimination."[39] This is not a matter of isolated acts of violence and torture but rather a coordinated dismantling of the rule of law and widespread practice of grave violations of human rights as the current norm.

39. A team of investigative journalists working to produce a report of human rights abuses under the State of Exception for an *Al Jazeera* documentary shared with me during my visit to El Salvador in early 2023 their preliminary findings, including an interview with an adolescent who had been released from Izalco prison who reported that there were daily beatings in prison, that "the guards would ignore people's requests for medical attention," that "guards would beat someone [un]til they were dead and then bring the body back into the cells and leave it there until the body started stinking," that food rations were so meager that they sometimes had to split one hard-boiled egg between two people for a meal, and that "usually the gang members in the cells would bully weaker people for their food." Former inmates revealed that tear gassing in the overcrowded prisons were so frequent that detainees would reserve one of the three small cups of water they usually received each day to flush their eyes after being gassed.[40]

40. Because the Salvadoran government has been actively attempting to conceal the human rights abuses occurring in prison, a team of investigative journalists at *El Faro* has been recording and publish weekly testimonies of individuals who survived incarceration under the State of Exception. These testimonies corroborate the reports cited above by confirming widespread torture including public beatings to death in front of other inmates, the deliberate withholding of medicine from sick inmates that has resulted in the need for appendages to be amputated, officials throwing prisoners' food on the ground so that inmates must lick the floor to survive, and guards knowing about but failing to take action to prevent some inmates from raping other inmates.[41]

41. Further testimonies gathered and published by the newspaper *El Pais* reveal practices such as prison officials in Izalco prison hosing down the floor of an overcrowded cell with water then

[38] Human and Community Rights Defense Unit (UNIDEHC). Violation of the Right to Health in the Country's Penal Centers. 2024. https://heyzine.com/flip-book/9849749093.html#page/1 p 18.
[39] "El Salvador: One year into state of emergency, authorities are systematically committing human rights violations." Amnesty International. 3 April 2023. https://www.amnesty.org/en/latest/news/2023/04/el-salvador-state-emergency-systematic-human-rights-violations/
[40] Mark Scialla, Salvadoran-based investigative journalist and director of documentary on human rights abuses under the State of Exception for *Al Jazeera* "Fault Lines." 28 February 2023, via message to Sarah Bishop.
[41] "Testimonios: Sobrevivientes de las Cárceles del Régimen." A weekly series from *El Faro.* https://especiales.elfaro.net/es/testimonios/

sending an electric current through the water to shock everyone inside, guards responding to inmates' pleas for medicine or food with beatings (sometimes to the point of death), and state officials' explicit threats to murder inmates and fabricate justifications, such as "I can shoot you right now and say you wanted to escape."[42]

42. El Salvador's government has repeatedly been accused of committing crimes against humanity. Zaria Navas, former Inspector General for the Salvadoran National Police and now head of Cristosal's Law and Security program, declared in June 2023 that due to the systemic and widespread human rights abuses committed during the State of Exception: "There is enough evidence for El Salvador to be tried for crimes against humanity."[43] Likewise, in July 2023, former Salvadoran Human Rights Ombudsman David Morales equated the abuses occurring in the prisons under the State of Exception with the 1932 genocide against the country's indigenous population and the atrocities committed during El Salvador's 1980-1992 civil war; like Navas, he described the government's actions as crimes against humanity.[44] More recently, in December 2024, Leonor Arteaga from the Due Process of Law Foundation concluded, "it is also likely that some of the torture enforced disappearances and extrajudicial executions that have been documented may constitute crimes against humanity which implies the existence of a plan or a policy to commit them involving a chain of command of government actors in El Salvador."[45]

Deaths in Prison

43. The deaths of around 375 incarcerated individuals since the start of the State of Exception have been recorded so far, but the human rights nongovernmental organization (NGO) Socorro Jurídico Humanitario that the actual number of deaths may exceed 1000 because of an estimated minimum of fifteen deaths per month that are not reported.[46]

44. In a sample of 100 cases of prison deaths that occurred during the first year of the State of Exception and for which a cause of death could be determined, Cristosal found through photographic, forensic, and testimonial evidence that 75% of the deaths 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.[47] Others have died due to being denied medical care.[48]

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[42] David Marcial Pérez. "The rampant abuse in El Salvador's prisons: 'They beat him to death in the cell and dragged him out like an animal'." *El Pais.* 26 March 2023. https://english.elpais.com/international/2023-03-26/the-rampant-abuse-in-el-salvadors-prisons-they-beat-him-to-death-in-the-cell-and-dragged-him-out-like-an-animal.html

[43] Julia Gavarrete. "There is Enough Evidence for El Salvador to be Tried for Crimes Against Humanity." *El Faro*. 7 June 2023. https://elfaro.net/en/202306/el_salvador/26881/there-is-enough-evidence-for-el-salvador-to-be-tried-for-crimes-against-humanity#

[44] Lissette Lemus. "David Morales: Los Crímenes que está Cometiendo el Gobierno Actual son de Lesa Humanidad." *El Salvador.com*. 16 July 2023. https://www.elsalvador.com/noticias/nacional/capturados-cristosal-regimen-de-excepcion-breaking-news/1076092/2023/

[45] Leonor Arteaga. "The State of Exception in El Salvador: Taking Stock." Testimony before the United States Congress, Tom Lantos Human Rights Commission. 10 December 2024. https://www.youtube.com/watch?v=ChTW-gm-5SI

[46] Socorro Jurídico Humanitario (Humanitarian Legal Aid). 16 March 2025. https://x.com/SJHumanitario/status/1901454047162372257

[47] Cristosal (2023). One Year Under State of Exception: A Permanent Measure of Repression and Human Rights Violations. https://cristosal.org/EN/wp-content/uploads/2023/08/One-year-under-the-state-of-exception-1.pdf. Page 29.

[48] David Bernal. "Socorro Jurídico ya contabiliza 235 reos muertos bajo régimen de excepción en El Salvador." 24 February 2024. *La Prensa Grafica*. https://www.laprensagrafica.com/elsalvador/Socorro-Juridico-ya-contabiliza-235-reos-muertos-en-regimen-20240223-0089.html

45. The actual number of deaths is impossible to confirm because of the government's opacity on the matter.[49] Noah Bullock, the director of Cristosal, explains, "Our investigations demonstrate a clear pattern of torture within the prisons and so we don't discount that the number of people who have died in the State of Emergency could be much higher."[50] The Salvadoran state maintains that all prison deaths have been the result of natural causes despite forensic evidence to the contrary.[51]

46. The known death rate in Salvadoran prisons is around 70 times greater than the international violent death according to the United Nations' 2024 Global Prison Population report.[52]

47. The organization MOVIR (Movimiento de Victimas del Régimen de Excepción, or Movement of Victims of the Regimen of Exception) has corroborated that a considerable number of the deaths evaluated so far have been a result of physical attacks of various kinds carried out by state agents, in addition to "beatings inflicted by other prisoners with acquiescence of the prison authorities."[53]

48. The testimony of Professor Mario Alberto Martínez, who was arrested and detained after making a public statement denouncing the arbitrary detention of his daughter, includes the account of his being in a highly overcrowded cell where inmates were not allowed to speak or even to pray. When three boys were caught talking, the guards removed them from the cell and beat them until they appeared to be dead. Martinez reports that "people died every day" while he was in prison.[54]

49. Even the deaths described by medical legal obituaries as nonviolent have in some cases involved cadavers that show forensic evidence of torture. One 45-year-old man with an intellectual disability died in prison and was buried by the state in a mass grave with a legal obituary that showed he died from a "pulmonary edema." However, photographic evidence of the cadaver showed edemas of his face, and interviews with individuals detained in the same prison reveal that he was beaten so severely that he lost mobility including the ability to eat.[55] Others have been released from prison in such severe physical states that they have died within days of release because of injuries they sustained in prison; they are not counted among the numbers of deaths in prison.[56]

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[49] Amnesty International. "Behind the veil of popularity: Repression and regression of human rights in El Salvador." 5 December 2023. https://www.amnesty.org/en/latest/news/2023/12/el-salvador-policies-practices-legislation-violate-human-rights/. p 33.
[50] "El Salvador's Prison State." *Fault Lines, Al Jazeera English*. May 24, 2023. https://www.aljazeera.com/program/fault-lines/2023/5/24/el-salvadors-prison-state
[51] Bryan Avelar. "Inmates in El Salvador tortured and strangled: A report denounces hellish conditions in Bukele's prisons." *El Pais*. 29 May 2023. https://english.elpais.com/international/2023-05-29/inmates-in-el-salvador-tortured-and-strangled-a-report-denounces-hellish-conditions-in-bukeles-prisons.html
[52] United Nations Office on Drugs and Crime (UNODC). "Global prison population and trends. A focus on rehabilitation." 15 August 2024. https://www.cdeunodc.inegi.org.mx/index.php/2024/08/15/global-prison-population-and-trends-a-focus-on-rehabilitation/; The figure of 366 deaths among an inmate population of 83,000 translates to a ratio of 404.82 deaths per 100,000, a rate 69.8 times greater than the international violent death rate of 5.8 per 100,000.
[53] Amnesty International. "Behind the veil of popularity: Repression and regression of human rights in El Salvador." 5 December 2023. https://www.amnesty.org/en/latest/news/2023/12/el-salvador-policies-practices-legislation-violate-human-rights/. P 33.
[54] Williams Sandoval. ""Vi cuando llevaban gente tiesa; todos los días moría gente": así narra un profesor su paso por las cárceles del régimen de excepción." *La Prensa Grafica.* 14 June 2024. https://www.laprensagrafica.com/elsalvador/Vi-cuando-llevaban-gente-tiesa-todos-los-dias-moria-gente-asi-narra-un-profesor-su-paso-por-las-carceles-del-regimen-de-excepcion-20240614-0056.html
[55] Bryan Avelar. "Inmates in El Salvador tortured and strangled: A report denounces hellish conditions in Bukele's prisons." *El Pais*. 29 May 2023. https://english.elpais.com/international/2023-05-29/inmates-in-el-salvador-tortured-and-strangled-a-report-denounces-hellish-conditions-in-bukeles-prisons.html
[56] Cristosal. "One Year Under the State of Exception." May 2023. https://cristosal.org/EN/2023/08/17/report-one-year-under-the-state-of-exception/ p 53.

50. It sometimes takes several months for family members to learn of the death of a loved one in prison, as was the case for a 76-year-old woman who was arrested in April 2022, died while in custody the following November, and was buried in a mass grave. Her children were not advised of her death and continued to send care packages to the prison until February 2023 when a lawyer told them their mother would be released on bail if they paid $3,000. When they arrived at the prison to deliver one last care package before their mother's release, guards told them she had been dead for months.[57]

Governmental Attempts to Obscure the Visibility of Human Rights Violations

51. Public access to national data is a central tenet of democracy that has been severely curtailed under Bukele as a means of maintaining popularity while allowing widespread human rights abuses to be committed out of public view. The government of El Salvador is intentionally restricting access to previously publicly available information especially as related to the police and military, prisoners, and the judiciary. As a result, it is becoming increasingly difficult for academics, NGOs, and other governments to access the information and statistics that would reveal the full scope of the disregard for human rights taking place in El Salvador. To produce evidence that is statistically significant instead of just anecdotal in this repressive context requires a coordinated approach to identify patterns and fidelity among pockets of available data in the rapidly unfolding human rights crisis.

52. As I and my coauthors in a 2023 report in Columbia University's *Regional Expert Series* explain, President Bukele's government has attempted to prevent public knowledge of continuing and widespread human rights abuses through strategies that include (1) denying outsiders access to the prisons, including the Salvadoran Human Rights Ombudsman's Office; (2) criminalizing the media and threatening journalists; (3) subjecting family members of the detained to threats of arrest if they speak publicly of their loved ones' experiences; and (4) routinely charging that individuals and groups who expose the abuses associated with the State of Exception are supporters of gang members and terrorists, in some cases leading to their imprisonment.[58]

53. Though international NGOs have been working for all three years of the State of Exception to document and corroborate widespread claims of human rights abuses taking place in El Salvador, this work is made highly difficult and sometimes impossible by the government's resistance. As described by Amnesty International in December 2023, "It is not possible to obtain official statistics such as the number of prisoners, overcrowding rate at detention centres, deaths of prisoners, number of crimes, [and] whether abuses of force by public security agents are being recorded and disciplined, among other citizen security variables used to monitor and assess the security situation and state of emergency."[59] Likewise, clandestine graves discovered in El Salvador are deemed by Bukele's government as matters of national security and the identities of their contents classified.

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[57] "Relato: Las mentiras de un abogado y el deterioro en el penal le costaron la vida a Rosa." La Prensa Grafica. 11 February 2023. https://www.laprensagrafica.com/elsalvador/Relato-Las-mentiras-de-un-abogado-y-el-deterioro-en-el-penal-le-costaron-la-vida-a-rosa-20230210-0095.html

[58] Sarah Bishop, Tommie Sue Montgomery, and Tom Boermann. "Behind the Glowing Headlines: Social Science Analysis of the State of Exception in El Salvador" CeMeCA's Regional Expert Series No. 9, 2023.

[59] Amnesty International. "Behind the veil of popularity: Repression and regression of human rights in El Salvador." 5 December 2023. https://www.amnesty.org/en/latest/news/2023/12/el-salvador-policies-practices-legislation-violate-human-rights/ p 64.

54. The State Department's 2023 Human Rights Report on El Salvador explicitly remarks on the invisibility of and lack of access to national data: "Human rights groups observed that the government increasingly declined to make public data for monitoring and analysis purposes. *Gato Encerrado,* an investigative newspaper, noted the government continued to expand the types of information it classified as confidential and not subject to public disclosure requirements."[60] Without reliable access to national data, neither the State Department nor any other concerned party can provide a more exhaustive view of country conditions that would be possible in more democratic contexts.

55. There are increasing instances of the government blatantly obscuring evidence of state violence. For example, the Attorney General of El Salvador claims to have investigated 143 deaths in prison during the State of Exception and found that every one of the 143 was due to pre-existing conditions or natural causes. However, the U.S. State Department Human Rights report released in 2024 offers evidence from sources including Socorro Jurídico Humanitario, Cristosal, and *El Pais* determining through forensic evidence dozens of violent deaths in prison including those where prison guards beat inmates to death.[61] What the U.S. State Department calls "systemic abuse in the prison system" is effectively denied by the Salvadoran State.

56. The government's clampdown on information related to human rights appears to be devolving. Whereas the 2022 U.S. State Department Human Rights report on El Salvador revealed that "The government reported varying numbers of disappearances and sporadically declined to provide media with numbers and additional data on disappearances, often claiming the statistics were classified,"[62] the report from the following year explains that the Minister of Justice and Public Security had announced the total suspension of investigations into disappearances.[63] These kinds of data would be more readily available in more democratic contexts and offer evidence of El Salvador's sharp democratic decline.

57. To create an illusion of improving country conditions with respect to gang violence, Bukele relies on rhetorical strategies that include selectively revealing and concealing national data.[64] The Inter-American Commission on Human Rights (IACHR) has criticized the Salvadoran State for "a lack of access to statistical data and official records on violence and crime from the Attorney General's Office and the Institute of Forensic Medicine, as well as other data from the PNC [National Civil Police], making it difficult to verify, contrast, and analyze information on citizen security."[65] IACHR notes the "absence of updated official data on incidents of injured or dead persons related to police or Armed Force officers that could be construed as human rights violations."[66] In other

[60] "El Salvador 2023 Human Rights Report." US Department of State. https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/el-salvador/ p 27.
[61] Ibid, p 2.
[62] "El Salvador 2022 Human Rights Report." US Department of State https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/ p 3.
[63] "El Salvador 2023 Human Rights Report." US Department of State. https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/el-salvador/ p 4.
[64] Parker Asmann. "El Salvador to Omit Key Data from Official Homicide Tally." *Insight Crime*. 18 July 2019. https://insightcrime.org/news/brief/el-salvador-omit-key-data-homicides/; Sarah C. Bishop. "An Illusion of Control: How El Salvador's President Rhetorically Inflates His Ability to Quell Violence." *Journalism and Media*, *4*, no. 1 (2023): 16-29.
[65]Inter-American Commission on Human Rights. "Follow-up of Recommendations Issued by the IACHR in its Country or Thematic Reports: El Salvador." 2022. https://www.oas.org/en/iachr/docs/annual/2022/Chapters/12-IA2022_Cap_5_El_Salvador_EN.pdf. p 874.
[66] Ibid., p 876.

words, the state has repeatedly refused to provide the information that would be necessary to know the full scope of and prosecute instances of police and military violence.

58. Americas Director for Amnesty International Ana Piquer reported in March 2024 that "the denial, minimization and concealment of reported serious human rights violations reflect the government's unwillingness to fulfil its duty to respect and promote human rights in the country."[67] By strategically concealing both the nature and scope of human rights abuses taking place, the government of El Salvador has managed to mitigate international awareness.

Gang Activity During the State of Exception

59. Publicly visible gang activity outside the prisons has quieted during the State of Exception, though gang violence inside the prisons subsists.[68] Since 2004, a practice had been in place to hold members of the two most powerful gangs in El Salvador, MS-13 and Barrio 18, in separate prisons in a measure designed to prevent both rival inter-gang violence and violence between gang members and civilians. Former Salvadoran Security Minister Bertrand Galindo explained, "The point was that if we left them in the same facilities, with the level of violence that was occurring and the weakness of the infrastructure, the state was not going to be able to prevent them from killing each other."[69] Bukele changed this policy in 2020 and reaffirmed on Twitter during the opening of his new 2023 mega-prison that gang members would be mixed together and held for decades[70]—a change certain to result in violence between the gangs and indicative of the Salvadoran state's determination not to protect its detained citizens from harm at the hands of the gangs.

60. The high probability of violent gang activity in prisons during the State of Exception in El Salvador since the policy changed has been confirmed by a range of instances such as a January 2025 riot in Izalco prison in which active gang members mixed together in a cell with retired gang members reportedly attacked each other using iron bars they had removed from their beds, resulting in at least three deaths.[71] Two weeks after the riot, three inmates from Izalco prison died in hospitals; the families of the deceased were informed that the cause of their deaths was "illness." [72]

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[67] Amnesty International. "El Salvador: The institutionalization of human rights violations after two years of emergency rule." 27 March 2024. https://www.amnesty.org/en/latest/news/2024/03/el-salvador-two-years-emergency-rule/

[68] "El Salvador 2022 Human Rights Report." U.S. Department of State. https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/ p 5.

[69] Roberto Valencia. "How El Salvador Handed its Prisons to the Mara Street Gangs." *InsightCrime* 3 September 2014. https://insightcrime.org/news/analysis/how-el-salvador-handed-its-prisons-to-the-gangs/#:~:text=On%20September%202%2C%202004%20the,active%20gang%20members%20call%20pesetas.

[70] Bukele, Nayib (@NayibBukele). 2023. Twitter, February 24, 2023. Translated from Spanish by Sarah C. Bishop. https://twitter.com/nayibbukele/status/1629165213600849920.

[71] David Bernal, Cindy Castillo y Claudia Espinoza. "Pedirán una investigación por motín en penal de Izalco." *La Presna Grafica.* 10 January 2025. https://www.laprensagrafica.com/elsalvador/Pediran-una-investigacion-por-motin-en-penal-de-Izalco-20250110-0063.html

[72] Oscar Reyes. "Reos de penal de Izalco mueren en hospitals." 28 January 2025. *La Prensa Grafica.* https://www.laprensagrafica.com/elsalvador/Reos-de-penal-de-Izalco-mueren-en-hospitales-20250128-0083.html

61. Bukele's failure to protect detainees from gang violence has been widely criticized by human rights organizations. Director for the Americas at Human Rights Watch José Miguel Vivanco stated that not separating gang-affiliated detainees from each other or from other detainees showed the government's "wickedness and cruelty;"[73] the Human Rights Commission of El Salvador stated that the practice "carries a total risk of mutinies or selective or collective murders."[74] Still, much of the news reporting on Bukele's change in procedure referenced the country's general prison overcrowding, as though the move was an inevitable reality in a national context where the prison population was already double its stated capacity. The fact that Bukele reiterated his intention to mix gang members together in the announcement of the opening of the new mega-prison that was promised to solve the issue of overcrowding reveals this practice as a deliberate strategy in knowing acquiescence to the violence likely to result rather than an unfortunate necessity.

62. In practice, this means that Salvadoran citizens, many of whom have been arrested arbitrarily, continue to be victim to gang control and authority even while detained. In some prisons, MS-13 and Barrio 18 are designating leaders of crowded cells to set cell rules and determine who receives food and water. Breaking the gang's rules may result in physical beatings.[75]

Conclusion

63. Deportees who are imprisoned in El Salvador are highly likely to face immediate and intentional life-threatening harm at the hands of state actors and a secondary threat of violence from incarcerated gang members.

Signature

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

Signature

March 19, 2025

Date

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[74] Marcos González Díaz. "Bukele contra las maras: las impactantes imágenes con las que El Salvador anunció que juntó a presos de diferentes pandillas en las celdas para combatir la violencia." *BBC News Mundo.* 28 April 2020. https://www.bbc.com/mundo/noticias-america-latina-52450557

[75] Stephen Dudley et al. "El Salvador's (Perpetual) State of Emergency: How Bukele's Government Overpowered Gangs." December 2023. https://insightcrime.org/investigations/el-salvador-perpetual-state-emergency-how-bukele-government-overpowered-gangs/#:~:text=In%20March%202022%2C%20the%20government,suspected%20gang%20members%20and%20collaborators p 6.

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").

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.*

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 24A931

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* J. G. G., ET AL.

ON APPLICATION TO VACATE THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[April 7, 2025]

PER CURIAM.

This matter concerns the detention and removal of Venezuelan nationals believed to be members of Tren de Aragua (TdA), an entity that the State Department has designated as a foreign terrorist organization. See 90 Fed. Reg. 10030 (2025). The President issued Proclamation No. 10903, invoking the Alien Enemies Act (AEA), Rev. Stat. §4067, 50 U. S. C. §21, to detain and remove Venezuelan nationals "who are members of TdA." Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua, 90 Fed. Reg. 13034. Five detainees and a putative class sought injunctive and declaratory relief against the implementation of, and their removal under, the Proclamation. Initially, the detainees sought relief in habeas among other causes of action, but they dismissed their habeas claims. On March 15, 2025, the District Court for the District of Columbia issued two temporary restraining orders (TROs) preventing any removal of the named plaintiffs and preventing removal under the AEA of a provisionally certified class consisting of "[a]ll noncitizens in U.S. custody who are subject to" the Proclamation. Minute Order on Motion To Certify Class in No. 25–cv–00766. On March 28, the District Court extended the TROs for up to an additional 14 days. See Fed. Rule Civ. Proc. 65(b)(2).

The D. C. Circuit denied the Government's emergency motion to stay the orders. The Government then applied to this Court, seeking vacatur of the orders. We construe these TROs as appealable injunctions. See *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 84 (1981).

We grant the application and vacate the TROs. The detainees seek equitable relief against the implementation of the Proclamation and against their removal under the AEA. They challenge the Government's interpretation of the Act and assert that they do not fall within the category of removable alien enemies. But we do not reach those arguments. Challenges to removal under the AEA, a statute which largely "'preclude[s] judicial review,'" *Ludecke* v. *Watkins*, 335 U. S. 160, 163–164, (1948), must be brought in habeas. Cf. *Heikkila* v. *Barber*, 345 U. S. 229, 234–235 (1953) (holding that habeas was the only cause of action available to challenge deportation under immigration statutes that "preclud[ed] judicial intervention" beyond what was necessary to vindicate due process rights). Regardless of whether the detainees formally request release from confinement, because their claims for relief "'necessarily imply the invalidity'" of their confinement and removal under the AEA, their claims fall within the "core" of the writ of habeas corpus and thus must be brought in habeas. Cf. *Nance* v. *Ward*, 597 U. S. 159, 167 (2022) (quoting *Heck* v. *Humphrey*, 512 U. S. 477, 487 (1994)). And "immediate physical release [is not] the only remedy under the federal writ of habeas corpus." *Peyton* v. *Rowe*, 391 U. S. 54, 67 (1968); see, *e.g.*, *Nance*, 597 U. S., at 167 (explaining that a capital prisoner may seek "to overturn his death sentence" in habeas by "analog[y]" to seeking release); *In re Bonner*, 151 U. S. 242, 254, 259 (1894). For "core habeas petitions," "jurisdiction lies in only one district: the district of confinement." *Rumsfeld* v. *Padilla*, 542 U. S. 426, 443 (2004). The detainees are confined in Texas, so venue is improper in the District of Columbia. As a result, the Government is likely to

succeed on the merits of this action.

The detainees also sought equitable relief against summary removal. Although judicial review under the AEA is limited, we have held that an individual subject to detention and removal under that statute is entitled to "'judicial review'" as to "questions of interpretation and constitutionality" of the Act as well as whether he or she "is in fact an alien enemy fourteen years of age or older." *Ludecke*, 335 U. S., at 163–164, 172, n. 17. (Under the Proclamation, the term "alien enemy" is defined to include "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." 90 Fed. Reg. 13034.) The detainees' rights against summary removal, however, are not currently in dispute. The Government expressly agrees that "TdA members subject to removal under the Alien Enemies Act get judicial review." Reply in Support of Application To Vacate 1. "It is well established that the Fifth Amendment entitles aliens to due process of law" in the context of removal proceedings. *Reno* v. *Flores*, 507 U. S. 292, 306 (1993). So, the detainees are entitled to notice and opportunity to be heard "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). More specifically, in this context, AEA detainees must receive notice after the date of this order that they are subject to removal under the Act. The notice must be afforded within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs.

For all the rhetoric of the dissents, today's order and *per curiam* confirm that the detainees subject to removal orders under the AEA are entitled to notice and an opportunity to challenge their removal. The only question is which court will resolve that challenge. For the reasons set forth, we

hold that venue lies in the district of confinement. The dissents would have the Court delay resolving that issue, requiring—given our decision today—that the process begin anew down the road. We see no benefit in such wasteful delay.

The application to vacate the orders of the United States District Court for the District of Columbia presented to THE CHIEF JUSTICE and by him referred to the Court is granted. The March 15, 2025 minute orders granting a temporary restraining order and March 28, 2025 extension of the United States District Court for the District of Columbia, case No. 1:25-cv-766, are vacated.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 24A931

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* J. G. G., ET AL.

ON APPLICATION TO VACATE THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[April 7, 2025]

JUSTICE KAVANAUGH, concurring.

I agree with the Court's *per curiam* opinion. Importantly, as the Court stresses, the Court's disagreement with the dissenters is not over *whether* the detainees receive judicial review of their transfers—all nine Members of the Court agree that judicial review is available. The only question is *where* that judicial review should occur. That venue question turns on whether these transfer claims belong in habeas corpus proceedings or instead may be brought under the Administrative Procedure Act. I agree with the Court's analysis that the claims must be brought in habeas.

I add only that the use of habeas for transfer claims is not novel. In the extradition context and with respect to transfers of Guantanamo and other wartime detainees, habeas corpus proceedings have long been the appropriate vehicle. See *LoBue* v. *Christopher*, 82 F. 3d 1081, 1082 (CADC 1996); *Kiyemba* v. *Obama*, 561 F. 3d 509, 512–513 (CADC 2009). That general rule holds true for claims under the Alien Enemies Act, the statute under which the Government is seeking to remove these detainees. See *Ludecke* v. *Watkins*, 335 U. S. 160, 163, 171, and n. 17 (1948). And going back to the English Habeas Corpus Act of 1679, if not earlier, habeas corpus has been the proper vehicle for detainees to bring claims seeking to bar their

transfers. See Habeas Corpus Act of 1679, 31 Car. 2, c. 2, §§11–12.

Especially given the history and precedent of using habeas corpus to review transfer claims, and given 5 U. S. C. §704, which states that claims under the APA are not available when there is another "adequate remedy in a court," I agree with the Court that habeas corpus, not the APA, is the proper vehicle here.

SUPREME COURT OF THE UNITED STATES

No. 24A931

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* J. G. G., ET AL.

ON APPLICATION TO VACATE THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[April 7, 2025]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, and with whom JUSTICE BARRETT joins as to Parts II and III–B, dissenting.

Three weeks ago, the Federal Government started sending scores of Venezuelan immigrants detained in the United States to a foreign prison in El Salvador. It did so without any due process of law, under the auspices of the Alien Enemies Act, a 1798 law designed for times of war. Between the start of these removals and now, a District Court has been expeditiously considering the legal claims of a group of detainees (hereafter plaintiffs), who allege that their summary removal violates the Constitution and multiple statutes. The District Court ordered a pause on plaintiffs' removals until it could consider their motion for a preliminary injunction at a hearing tomorrow, on April 8. Still, a majority of the Court sees fit to speak to this issue today.

Critically, even the majority today agrees, and the Federal Government now admits, that individuals subject to removal under the Alien Enemies Act are entitled to adequate notice and judicial review before they can be removed. That should have been the end of the matter. Yet, with "barebones briefing, no argument, and scarce time for reflection," *Department of Education* v. *California*, 604 U. S. ___, ___

(2025) (KAGAN, J., dissenting) (slip op., at 2), the Court announces that legal challenges to an individual's removal under the Alien Enemies Act must be brought in habeas petitions in the district where they are detained.

The Court's legal conclusion is suspect. The Court intervenes anyway, granting the Government extraordinary relief and vacating the District Court's order on that basis alone. It does so without mention of the grave harm Plaintiffs will face if they are erroneously removed to El Salvador or regard for the Government's attempts to subvert the judicial process throughout this litigation. Because the Court should not reward the Government's efforts to erode the rule of law with discretionary equitable relief, I respectfully dissent.

I

A

This case arises out of the President's unprecedented peacetime invocation of a wartime law known as the Alien Enemies Act. See Act of July 6, 1798, ch. 66, 1 Stat. 577. Enacted in 1798 by a Congress consumed with fear of war with France, the Alien Enemies Act provided a wartime counterpart to the widely denounced Alien Friends Act, which granted the President sweeping power to detain and expel any noncitizen he deemed "dangerous to the peace and safety of the United States." Act of June 25, 1798, 1 Stat. 571. Unlike the Alien Friends Act, which lapsed in disrepute as James Madison deemed it "a monster that must for ever disgrace its parents," the Founders saw the Alien Enemies Act as a constitutional exercise of Congress's powers to "declare War," to "raise and support Armies," and to "provide for calling forth the Militia to . . . suppress Insurrections and repel Invasions." U. S. Const., Art. I, §8, cls. 11–15.[1]

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[1] Letter from J. Madison to T. Jefferson (May 20, 1798), in 30 Papers of Thomas Jefferson 358 (B. Oberg ed. 2003); see also Madison's Report

To that end, the Act grants the President power to detain and remove foreign citizens of a "hostile nation or government" when "there is a declared war" with such nation or when a "foreign nation" threatens "invasion or predatory incursion" against the territory of the United States. Rev. Stat. §4067, 50 U. S. C. §21. Before today, U. S. Presidents have invoked the Alien Enemies Act only three times, each in the context of an ongoing war: the War of 1812, World War I, and World War II.[2]

That changed on March 14, 2025, when President Trump invoked the Alien Enemies Act to address an alleged "Invasion of the United States by Tren De Aragua," a criminal organization based in Venezuela. See Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua, Proclamation No. 10903, 90 Fed. Reg. 13033. There is, of course, no ongoing war between the United States and Venezuela. Nor is Tren de Aragua itself a "foreign nation." §21. The President's Proclamation nonetheless asserts that Tren de Aragua 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." 90 Fed. Reg. 13034. Based on these findings, the Proclamation declares that "all Venezuelan citizens 14 years of age or older who are members of [Tren de Aragua]" and are not "naturalized [citizens] or lawful permanent residents" are liable to "immediate apprehension, detention, and removal" as alien enemies. *Ibid.*

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on the Virginia Resolution, in The Book of the Constitution 52 (E. Williams ed. 1833).

[2] *Lockington* v. *Smith*, 15 F. Cas. 758, 758–759 (No. 8,448) (CC Pa. 1817) (discussing the War of 1812 proclamation); Declaring the Existence of a State of War With the German Empire and Setting Forth Regulations Prescribing Conduct Toward Alien Enemies, Proclamation No. 1364, 40 Stat. 1650 (World War I); Alien Enemies—Japanese, Proclamation No. 2525, 55 Stat. 1700 (World War II).

Congress requires the President to "mak[e] public proclamation" of his intention to invoke the Alien Enemies Act. §21. President Trump did just the opposite. In what can be understood only as covert preparation to skirt both the requirements of the Act and the Constitution's guarantee of due process, the Department of Homeland Security (DHS) began moving Venezuelan migrants from Immigration and Customs Enforcement detention centers across the country to the El Valle Detention Facility in South Texas before the President had even signed the Proclamation. ___ F. Supp. 3d ___, ___ 2025 WL 890401, *3 (D DC, Mar. 24, 2025). The transferred detainees, most of whom denied past or present affiliation with any gang, did not know the reason for their transfer until the evening of Friday, March 14, when they were apparently "pulled from their cells and told that they would be deported the next day to an unknown destination." *Ibid.*

B

Suspecting that the President had covertly signed a Proclamation invoking the Alien Enemies Act, several lawyers anticipated their clients' imminent deportation and filed a putative class action in the District of Columbia. App. to Brief in Opposition To Application To Vacate 9a (App. to BIO). They contested that Tren de Aragua had committed or attempted the kind of "'invasion'" or "'predatory incursion'" required to invoke the Alien Enemies Act. *Ibid.* They also asserted that it would violate the Due Process Clause to deport their clients before they had any chance to challenge the Government's allegations of gang membership. *Id.*, at 26a. The plaintiffs did not seek release from custody, but asked the court only to restrain the Government's planned deportations under the Proclamation. *Id.*, at 9a, 29a.

In the early morning of March 15, the District Court informed the Government of the lawsuit and scheduled an

emergency hearing. Despite knowing of plaintiffs' claim that it would be unlawful to remove them under the Proclamation, the Government ushered the named plaintiffs onto planes along with dozens of other detainees, all without any opportunity to contact their lawyers, much less notice or opportunity to be heard. See 2025 WL 890401, *5; see also, *e.g.*, Decl. of G. Carney in No. 25–cv–00766 (D DC, Mar. 19, 2025), ECF Doc. 44–11, at 2.

The Government's plan, it appeared, was to rush plaintiffs out of the country before a court could decide whether the President's invocation of the Alien Enemies Act was lawful or whether these individuals were, in fact, members of Tren de Aragua. Plaintiff J. G. G., for example, had no chance to tell a court that the tattoos causing DHS to suspect him of gang membership were unrelated to a gang. Decl. of J. G. G., ECF Doc. 3–3, at 1. He avers that he is a tattoo artist who "got [an] eye tattoo because [he] saw it on Google" and "thought it looked cool." *Ibid.* Plaintiff G. F. F., too, was denied the chance to inform a court that the Government accused him of being an "associate/affiliate of Tren d[e] Aragua" based solely on his presence at a party of strangers, which he attended at the "insistence of a friend." Decl. of G. Carney, ECF Doc. 3–4, at 1.

C

Recognizing the emergency the Government had created by deporting plaintiffs without due process, the District Court issued a temporary restraining order that same morning. The order prohibited the Government from removing the five named plaintiffs, including J. G. G. and G. F. F., pending ongoing litigation. G. F. F., who had been "on a plane for about forty minutes to an hour" as "crying and frightened" individuals were forced on board, was subsequently retrieved from the plane by a guard who told him he "'just won the lottery.'" Decl. of G. Carney, ECF Doc. 44–11, at 3.

The court then set an emergency hearing for 5 p.m. that same day, at which it planned to consider plaintiffs' claim that temporary relief should be extended to a class of all noncitizens subject to the anticipated Proclamation. See 2025 WL 890401, *4. Despite notice to the Government of the Court's scheduled hearing, DHS continued to load up the two planes with detainees and scheduled their immediate departure. See Tr. 12 (Mar. 15, 2025) (Two flights "were scheduled for this afternoon that may have already taken off or [will] during this hearing"); Tr. 9 (Apr. 3, 2025) (Government counsel agreeing that DHS was "acting in preparation of the proclamation before it was posted"). Not until an hour before the District Court's scheduled hearing, and only moments before the Government planned to send its planes off to El Salvador, did the White House finally publish the Proclamation on its website.

At its 5 p.m. hearing, the District Court provisionally certified a class of Venezuelan noncitizens subject to the Proclamation. See Tr. 23, 25 (Mar. 15, 2025). It then issued an oral temporary restraining order prohibiting the Government from removing all members of the class pursuant to the Proclamation for 14 days. *Id.*, at 42. The order did not disturb the Government's ability to apprehend or detain individuals pursuant to the Proclamation or its authority to deport any individual under the Immigration and Naturalization Act. See *ibid.*; see 2025 WL 890401, *1. All it required of the Government was a pause in deportations pursuant to the Proclamation until the court had a chance to review their legality. See Tr. 4 (Apr. 3, 2025) ("All th[e] [TROs] did was order that the government could not summarily deport in-custody noncitizens who were subject to the proclamation without a hearing"). The court further directed 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." Tr. 43 (Mar. 15, 2025).

D

Concerns about the Government's compliance with the order quickly followed. Even now, the District Court continues to investigate what happened via show-cause proceedings. In those proceedings, the Government took the position that it had no legal obligation to obey the District Court's orders directing the return of planes in flight because they were issued from the bench. See Tr. 17 (Mar. 17, 2025) ("[O]ral statements are not injunctions"). Of course, as the Government well knows, courts routinely issue rulings from the bench, and those rulings can be appealed, including to this Court, in appropriate circumstances.[3]

The District Court, for its part, has surmised that "the Government knew as of 10 a.m. on March 15 that the Court would hold a hearing later that day," yet it "hustled people onto those planes in hopes of evading an injunction or perhaps preventing [individuals] from requesting the habeas hearing to which the Government now acknowledges they are entitled." 2025 WL 890401, *5. Rather than turn around the planes that were in the air when the Court issued its order, moreover, the Federal Government landed the planes full of alleged Venezuelan nationals in El Salvador and transferred them directly into El Salvador's Center for Terrorism Confinement (CECOT). *Ibid.*

Deportation directly into CECOT presented a risk of extraordinary harm to these Plaintiffs. The record reflects

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[3] See, *e.g.*, *United States* v. *Fruehauf*, 365 U. S. 146, 154 (1961) (hearing Government's direct appeal from oral ruling); *Evans* v. *Michigan*, 568 U. S. 313, 320 (2013) (relying on lower court's oral ruling); see also *Wright* v. *Continental Airlines Corp.*, 103 F. 3d 146 (CA10 1996) (Table) (oral ruling was binding on parties); *In re Justice*, 172 F. 3d 876 (CA9 1999) (Table) (oral order was binding and effective even when written order was never entered); *Ueckert* v. *Guerra*, 38 F. 4th 446, 451–452 (CA5 2022) (oral ruling final and appealable even where district court never issued written judgment).

that inmates in Salvadoran prisons are "'highly likely to face immediate and intentional life-threatening harm at the hands of state actors.'" *Id.*, at *16 (quoting App. to BIO 258a). CECOT detainees are frequently "denied communication with their relatives and lawyers, and only appear before courts in online hearings, often in groups of several hundred detainees at the same time." App. to BIO 260a. El Salvador has boasted that inmates in CECOT "'will never leave,'" *ibid.*, and plaintiffs present evidence 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," 2025 WL 890401, *16. One scholar attests that an estimated 375 detainees have died in Salvadoran prisons since March 2022. *Ibid.*

What if the Government later determines that it sent one of these detainees to CECOT in error? Or a court eventually decides that the President lacked authority under the Alien Enemies Act to declare that Tren de Aragua is perpetrating or attempting an "invasion" against the territory of the United States? The Government takes the position that, even when it makes a mistake, it cannot retrieve individuals from the Salvadoran prisons to which it has sent them. See Defendant's Memorandum of Law in Opposition in *Abrego Garcia* v. *Noem*, No. 25–cv–951 (D Md., Mar. 31, 2025), ECF Doc. 11, at 7–9. The implication of the Government's position is that not only noncitizens but also United States citizens could be taken off the streets, forced onto planes, and confined to foreign prisons with no opportunity for redress if judicial review is denied unlawfully before removal. History is no stranger to such lawless regimes, but this Nation's system of laws is designed to prevent, not enable, their rise.

E

Even as the Government has continued to litigate

whether its March 15 deportations complied with the District Court's orders, it simultaneously sought permission to resume summary deportations under the Proclamation. The District Court, first, denied the Government's motion to vacate its temporary restraining order, rejecting the assertion that "the President's authority and discretion under the [Alien Enemies Act] is not a proper subject for judicial scrutiny." App. to BIO 71a. At the very least, the District Court concluded, the plaintiffs were "likely to succeed" on their claim that, "before they may be deported, they are entitled to individualized hearings to determine whether the Act applies to them at all." 2025 WL 890401, *2. The D. C. Circuit, too, denied the Government a requested stay and kept in place the District Court's pause on deportations under the Alien Enemies Act pending further proceedings. 2025 WL 914682, *1 (*per curiam*) (Mar. 26, 2025).

It is only this Court that sees reason to vacate, for the second time this week, a temporary restraining order standing "on its last legs." *Department of Education*, 604 U. S., at ___ (JACKSON, J., dissenting) (slip op., at 1). Not content to wait until tomorrow, when the District Court will have a chance to consider full preliminary injunction briefing at a scheduled hearing, this Court intervenes to relieve the Government of its obligation under the order.

II

Begin with that upon which all nine Members of this Court agree. The Court's order today dictates, in no uncertain terms, that "individual[s] subject to detention and removal under the [Alien Enemies Act are] entitled to 'judicial review' as to 'questions of interpretation and constitutionality' of the Act as well as whether he or she 'is in fact an alien enemy fourteen years of age or older.'" *Ante,* at 2 (quoting *Ludecke* v. *Watkins*, 335 U. S. 160, 163–164, 172, n. 17 (1948)). Therefore, under today's order, courts below

will probe, among other things, the meaning of an "invasion" or "predatory incursion," 50 U. S. C. §21, and ask, for example, whether any given individual is in fact a member of Tren de Aragua. Even the Government has now largely conceded that point. Application 19.

So too do we all agree with the *per curiam*'s command that the Fifth Amendment requires the Government to afford plaintiffs "notice after the date of this order that they are subject to removal under the Act, . . . within reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs." *Ante,* at 3. That means, of course, that the Government cannot usher any detainees, including plaintiffs, onto planes in a shroud of secrecy, as it did on March 15, 2025. Nor can the Government "immediately resume" removing individuals without notice upon vacatur of the TRO, as it promised the D. C. Circuit it would do. See 2025 WL 914682, *13 (Millett, J., concurring) (referencing oral argument before that court). To the extent the Government removes even one individual without affording him notice and a meaningful opportunity to file and pursue habeas relief, it does so in direct contravention of an edict by the United States Supreme Court.

III

In light of this agreement, the Court's decision to intervene in this litigation is as inexplicable as it is dangerous. Recall that, when the District Court issued its temporary restraining order on March 15, 2025, the Government was engaged in a covert operation to deport dozens of immigrants without notice or an opportunity for hearings. The Court's ruling today means that those deportations violated the Due Process Clause's most fundamental protections. See *ante*, at 3 (reiterating that notice and an opportunity for a hearing are required before a deportation under the Alien Enemies Act). The District Court rightly intervened

to prohibit temporarily the Government from deporting more individuals in this manner, based on its correct assessment that the plaintiffs were likely entitled to more process. 2025 WL 890401, *2.

Against the backdrop of the U. S. Government's unprecedented deportation of dozens of immigrants to a foreign prison without due process, a majority of this Court sees fit to vacate the District Court's order. The reason, apparently, is that the majority thinks plaintiffs' claims should have been styled as habeas actions and filed in the districts of their detention. In reaching that result, the majority flouts well-established limits on its jurisdiction, creates new law on the emergency docket, and elides the serious threat our intervention poses to the lives of individual detainees.

A

As an initial matter, the Court lacks jurisdiction to review the District Court's time-limited, interlocutory order. It is well established that, generally, "temporary restraining orders are not appealable." 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3922.1, p. 90 (3d ed. 2012). That rule is a general one because it gives way where a temporary restraining order risks imposing such an "'irreparable . . . consequence'" that an immediate appeal is necessary if the order is to be "'effectually challenged'" at all. *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 84 (1981).

Here, the District Court ordered a 14-day halt on deportations pursuant to the Proclamation (extended once for 14 additional days) because it thought the plaintiffs were likely entitled to "individualized hearings to determine whether the Act applies to them at all." 2025 WL 890401, *2. The Government now admits that it must provide detainees with adequate notice, and it says they can then file habeas petitions in the Southern District of Texas to contest

and stay their removal under the Alien Enemies Act. Such proceedings, if adequately provided, necessarily mean that the Government cannot imminently deport the Plaintiffs under the Proclamation. So it is hard to see why the District Court's temporary restraining order (of which only five days now remain) presented the Government with an emergency of any kind, much less one that required an immediate appeal.

B

Also troubling is this Court's decision to vacate summarily the District Court's order on the novel ground that an individual's challenge to his removal under the Alien Enemies Act "fall[s] within the 'core' of the writ of habeas corpus" and must therefore be filed where the plaintiffs are detained. *Ante,* at 2. The Court reaches that conclusion without oral argument or the benefit of percolation in the lower courts, and with just a few days of deliberation based on barebones briefing.

This conclusion is dubious. As an initial matter, the majority's assertion that plaintiffs' claims "sound" in habeas is in tension with this Court's understanding of habeas corpus as, at its core, an avenue for a person in custody to "attack . . . the legality of that custody" and "to secure release from illegal custody." *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973). The plaintiffs in this case sued not to challenge their detention, but to protect themselves from summary deportation pursuant to the Proclamation. Indeed, because all of the plaintiffs were already in immigration detention under other statutes when the Government subjected them to the Proclamation, they "have repeatedly emphasized throughout this litigation that they 'do not seek release from custody' " and are not "contesting the validity of their confinement or seeking to shorten its duration." 2025 WL 890401, *8.

Nevertheless, the majority insists that plaintiffs' claims

"'necessarily imply the invalidity'" of their confinement and removal under the Act, and so essentially amount to a challenge to their present physical confinement. *Ante,* at 2. It therefore analogizes this case to the line of cases beginning with *Heck* v. *Humphrey*, 512 U. S. 477 (1994), where the Court held that individuals serving state criminal sentences cannot bring 42 U. S. C. §1983 suits to complain of "unconstitutional treatment at the hands of state officials" if a judgment in their favor would "necessarily imply the invalidity of his conviction or sentence." 512 U. S., at 480, 487. In such cases, habeas is the exclusive avenue for relief. *Ibid.* Plaintiffs' claims, however, do not "imply the invalidity of" their detention, because their detention predated the Proclamation and was unrelated to the Alien Enemies Act. Thus, if they succeeded in showing that they could not be removed under the Proclamation, that would not result in their release from detention. Even in the context of §1983 challenges by criminal defendants, this 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) (brackets omitted).

There is also good reason to doubt that *Heck*'s holding about the availability of relief under §1983 extends to Administrative Procedure Act (APA) claims challenging executive action under the Alien Enemies Act. The *Heck* bar arose from the Court reading an "'implicit exception'" into §1983 to avoid "swamping the habeas statute's coverage of claims that the prisoner is 'in custody in violation of the Constitution.'" *Nance* v. *Ward*, 597 U. S. 159, 167 (2022) (quoting 28 U. S. C. §2254(a)). This Court has never limited the availability of APA relief so narrowly. To the contrary, the APA has long been available to plaintiffs absent specific preclusion by Congress. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967).

Although the APA allows courts to review only agency action "for which there is no other adequate remedy in a court," 5 U. S. C. §704, this Court has long read that limitation narrowly, emphasizing that it "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Bowen* v. *Massachusetts*, 487 U. S. 879, 903 (1988); see also *Darby* v. *Cisneros*, 509 U. S. 137, 146 (1993) ("Congress intended by that provision simply to avoid duplicating previously established special statutory procedures for review of agency actions"). Indeed, in the mid-20th century, this Court repeatedly said that habeas and APA actions were both available to noncitizens challenging their deportation orders. See *Brownell* v. *Tom We Shung*, 352 U. S. 180, 181 (1956) ("[E]ither remedy is available in seeking review of [deportation] orders"); see also *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 50–51 (1955) (allowing for judicial review of a deportation order under the APA).

Against that backdrop, there is every reason to question the majority's hurried conclusion that habeas relief supplies the exclusive means to challenge removal under the Alien Enemies Act. At the very least, the question is a thorny one, and this emergency application was not the place to resolve it. Nor was it the Court's last chance to weigh in. The debate about habeas exclusivity remains ongoing in the District Court, in the context of pending preliminary injunction proceedings. If the District Court were to resolve the question in plaintiffs' favor, the Government could have appealed to this Court in the ordinary course, and we could have decided it after thorough briefing and oral argument. In its rush to decide the issue now, the Court halts the lower court's work and forces us to decide the matter after mere days of deliberation and without adequate time to weigh the parties' arguments or the full record of the District Court's proceedings.

C

The majority's rush to resolve the question is all the more troubling because this is not one of those rare cases in which the Court must immediately intervene "despite the risk" of error attendant in deciding novel legal questions on the emergency docket. *Department of Education*, 604 U. S., at ___, (KAGAN, J., dissenting) (slip op., at 2). Recall that the dispute has now narrowed into a debate about "which procedural vehicle is best situated for the Plaintiffs' injunctive and declaratory claims": individual habeas petitions filed in district courts across the country or a class action filed in the District of Columbia. 2025 WL 914682, *29 (Millett, J., concurring). The Government may well prefer to defend against "300 or more individual habeas petitions" than face this class APA case in Washington, D. C. *Ibid.* That is especially so because the Government can transfer detainees to particular locations in an attempt to secure a more hospitable judicial forum. But such a preference for defending against one form of litigation over the other is far from the kind of concrete and irreparable harm that requires this Court to take the "'extraordinary'" step of intervening at this moment, while litigation in the lower courts remains ongoing. *Williams* v. *Zbaraz*, 442 U. S. 1309, 1311 (1979) (Stevens, J., in chambers); see *Department of Education*, 604 U. S., at ___ (JACKSON, J., dissenting) (slip op., at 8).

Meanwhile, funneling plaintiffs' claims into individual habeas actions across the Nation risks exposing them to severe and irreparable harm. Rather than seeking to enjoin implementation of the President's Proclamation against all Venezuelan nationals in immigration detention, detainees scattered across the country must each obtain counsel and file habeas petitions on their own accord, all without knowing whether they will remain in detention where they were arrested or be secretly transferred to an alternative location. Cf. *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 860 (1999) ("One great advantage of class action treatment . . .

is the opportunity to save the enormous transaction costs of piecemeal litigation").

That requirement may have life or death consequences. Individuals who are unable to secure counsel, or who cannot timely appeal an adverse judgment rendered by a habeas court, face the prospect of removal directly into the perilous conditions of El Salvador's CECOT, where detainees suffer egregious human rights abuses. See *supra*, at 7–8. Anyone the Government mistakenly deports in its piecemeal and rushed implementation of the challenged Proclamation will face the same grave risks. Cf. Defendant's Memorandum of Law in Opposition in *Abrego Garcia* v. *Noem*, No. 25–cv–951 (D Md., Mar. 31, 2025), ECF Doc. 11, at 3.

The stakes are all the more obvious in light of the Government's insistence that, once it sends someone to CECOT, it cannot be made to retrieve them. *Ibid.* The Government is at this very moment seeking emergency relief from an order requiring it to facilitate the return of an individual the Government concededly removed to CECOT "because of an administrative error." *Id.*, at 5; see Emergency Motion for Stay Pending Appeal and Immediate Administrative Stay in *Abrego Garcia* v. *Noem*, No. 25–1345 (CA4, Apr. 5, 2025), ECF Doc. 3–1, at 2 ("No federal court has the power to command the Executive to engage in a certain act of foreign relations . . ."). The Government's resistance to facilitating the return of individuals erroneously removed to CECOT only amplifies the specter that, even if this Court someday declares the President's Proclamation unlawful, scores of individual lives may be irretrievably lost.

More fundamentally, this Court exercises its equitable discretion to intervene without accounting for the Government noncompliance that has permeated this litigation to date. The maxim that "'he who comes into equity must come with clean hands'" has long guided this Court's exercise of equitable discretion. *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806,

814 (1945). While "'equity does not demand that its suitors shall have led blameless lives'" as to other matters, "it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." *Id.*, at 814–815 (citing *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245 (1933)).

Far from acting "fairly" as to the controversy in District Court, the Government has largely ignored its obligations to the rule of law. From the start, the Government sought to avoid judicial review, "hustl[ing] people onto those planes" without notice or public Proclamation apparently "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." 2025 WL 890401, *5. That the District Court is engaged in a sincere inquiry into whether the Government willfully violated its March 15, 2025, order to turn around the planes should be reason enough to doubt that the Government appears before this Court with clean hands. That is all the more true because the Government has persistently stonewalled the District Court's efforts to find out whether the Government in fact flouted its express order. See Tr. 4–5 (Mar. 15, 2025); Tr. 6–9 (Mar. 17, 2025).

* * *

The Government's conduct in this litigation poses an extraordinary threat to the rule of law. That a majority of this Court now rewards the Government for its behavior with discretionary equitable relief is indefensible. We, as a Nation and a court of law, should be better than this. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 24A931

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* J. G. G., ET AL.

ON APPLICATION TO VACATE THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[April 7, 2025]

JUSTICE JACKSON, dissenting.

I join JUSTICE SOTOMAYOR's dissent in full and would deny the application for all the reasons she explains. I write separately to question the majority's choice to intervene on the eve of the District Court's preliminary-injunction hearing without scheduling argument or receiving merits briefing. This fly-by-night approach to the work of the Supreme Court is not only misguided. It is also dangerous.

The President of the United States has invoked a centuries-old wartime statute to whisk people away to a notoriously brutal, foreign-run prison. For lovers of liberty, this should be quite concerning. Surely, the question whether such Government action is consistent with our Constitution and laws warrants considerable thought and attention from the Judiciary. That was why the District Court issued a temporary restraining order to prevent immediate harm to the targeted individuals while the court considered the lawfulness of the Government's conduct. But this Court now sees fit to intervene, hastily dashing off a four-paragraph *per curiam* opinion discarding the District Court's order based solely on a new legal pronouncement that, one might have thought, would require significant deliberation.

When this Court decides complex and monumental issues, it typically allows the lower courts to address those

matters first; it then receives full briefing, hears oral argument, deliberates internally, and, finally, issues a reasoned opinion. Those standard processes may not always yield correct results. But when we deviate from them, the risk of error always substantially increases. Today's rushed conclusion—that those challenging the Government's action can only pursue their claims through habeas—is Exhibit A.

I lament that the Court appears to have embarked on a new era of procedural variability, and that it has done so in such a casual, inequitable, and, in my view, inappropriate manner. See *Department of Education* v. *California*, 604 U. S. ___ , ___ (2025) (JACKSON, J., dissenting) (slip op., at 1–2). At least when the Court went off base in the past, it left a record so posterity could see how it went wrong. See, *e.g.*, *Korematsu* v. *United States*, 323 U. S. 214 (1944). With more and more of our most significant rulings taking place in the shadows of our emergency docket, today's Court leaves less and less of a trace. But make no mistake: We are just as wrong now as we have been in the past, with similarly devastating consequences. It just seems we are now less willing to face it.