UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-1163-CNS

D.B.U. *et al*.,

Petitioners-Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al*.,

Respondents-Defendants.

REPLY IN SUPPORT OF PETITIONERS-PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The government has provided no reason for this Court to reevaluate any of its indisputably correct rulings. And since Petitioners' opening brief, a district court in the Southern District of Texas has followed this Court's lead in holding that the Proclamation is at odds with the AEA, and the Tenth Circuit has denied the government's stay request of this Court's TRO. *See J.A.V. v. Trump*, No. 1:25-cv-72, 2025 WL 1257450 (S.D. Tex. May 1, 2025); *D.B.U. v. Trump*, No. 25-1164, 2025 WL 1233583 (10th Cir. Apr. 29, 2025). Given the grave harm Petitioners face, a preliminary injunction is plainly warranted.[1]

ARGUMENT

I. THE COURT CAN REVIEW PETITIONERS' CLAIMS.

As this Court has already held, Petitioners have standing to bring their claims because they face significant risk of "reclassification as Proclamation-eligible—and removable." TRO Op. 5;[2] *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 164 (2014). The Proclamation applies on its face to all alleged Venezuelan Tren de Aragua ("TdA") members without exception. Proclamation ¶¶ 1-3. Petitioners have met

[1] Petitioners respectfully request that the Court further enjoin Respondents from ceding custody (including physical custody) or control of class members to another agency for transfer or removal, given its recent admission that it did exactly that to circumvent another injunction, *see D.V.D. v. DHS*, No. 1:25-cv-10676 (D. Mass.), ECF No. 72 ¶¶ 3-6 (admitting that government removed individuals to El Salvador, but claiming that government did not violate TRO because "the Department of Defense is not a defendant in this action"), ECF No. 72-1 ¶¶ 12, 18, 27, 51 (Huettl Decl.) (same); *see also id.* ECF 86 (modifying injunction to cover transfer to other agencies). Such relief is warranted not only because of what occurred in *D.V.D.*, but also given news reports that the government used military aircraft to remove individuals from Colorado on April 24, 25, and 28, then transferred custody to DoD for DoD to "transport the aliens internationally," *see* Marc Salinger, *Coast Guard Transports ICE Detainees from Colorado to Texas and California for Deportation*, 9News (Apr. 29, 2025), *available at* https://perma.cc/NEM7-ETAR.

[2] TRO Op. is ECF No. 35 and Opp. is ECF No. 48.

the predicate for designation under the Proclamation—Petitioners' I-213 Forms (submitted by the government) allege association with TdA, and Respondents have reiterated those claims in immigration court. *See* ECF No. 31-2 ¶ 3; ECF No. 2-2, ¶¶ 5-6; *see also Frank v. Lee*, 84 F.4th 1119, 1134 (10th Cir. 2023) ("a credible threat of prosecution can be found where no actual threats have been made"). Moreover, Respondents "have explicitly declined to foreclose" the possibility of designation pending this litigation. TRO Op. 13; ECF No. 26-1, ¶¶ 4-5, 15, 23. Given this overwhelming risk, Petitioners need not wait for the actual moment of designation, particularly where the government has every incentive to wait until the last minute to designate individuals and, indeed, has done just that elsewhere. *See* Harris Decl., *J.A.V. v. Trump*, No. 1:25-cv-72 (S.D. Tex. Apr. 24, 2025), ECF No. 48-2 ¶¶ 12-13 (people who received notices and were told they would be deported the same day); S.Z.F.R. Decl., *J.G.G. v. Trump*, No. 1:25-cv-766 (D.D.C. Mar. 24, 2025), ECF No. 55-1 ¶ 17 (notices distributed on plane). And, as this Court has already recognized, this risk is sufficient to establish that Petitioners are "in custody" for habeas purposes. TRO Op. 11-14.

Respondents' argument that Petitioners and provisional class members suffer no injury because they have filed or can file a habeas petition misunderstands the nature of their claims. Opp. 7-8. Petitioners challenge not just the minimum notice required, but also threshold issues like the Proclamation's failure to satisfy the AEA's statutory predicates. These claims remain live, and Respondents do not argue to the contrary. In any event, the fact that Petitioners have been able to get into court does not cure the deficient notice or preclude them from challenging it on behalf of the class. This is especially true given how little notice is given. *See infra*. The government's recent actions

in North Texas underscore the dangerous catch-22 that Respondents' position creates: Those who do manage to file habeas petitions are too early and lack injury to challenge the notice process; but those who wait until getting a designation will likely be too late, both because of the deficient notice process and because the government claims it has no ability to rectify their wrongful removal. That Petitioners were able to act swiftly enough to seek relief does not insulate an unlawful policy from judicial review.

Respondents' remaining threshold arguments disclaiming this Court's jurisdiction fare no better. Opp. 8-11. The Supreme Court has already foreclosed Respondents' argument that the statute's preconditions are not subject to judicial review. TRO Op. 17-19 (citing *Trump v. J.G.G.*, 145 S. Ct. 1003, 1006 (2025)). Similarly, in *J.A.V.*, the court likewise found that whether the Proclamation satisfies the AEA's statutory preconditions is reviewable. 2025 WL 1257450, at *13-18 (granting summary judgment on ground that there is no invasion or incursion within meaning of the AEA).[3]

Respondents are also incorrect that CAT claims may be raised only in immigration proceedings and then on appeal directly to the circuit. Opp. 12 (citing 8 U.S.C. § 1252(a)(4)). Where Petitioners "have no opportunity to raise these issues before an I[mmigration] J[udge] . . . there can be no judicial review as contemplated in the

[3] Respondents' reliance on *United States v. Abbott*, 110 F.4th 700 (5th Cir. 2024), *California v. United States*, 104 F.3d 1086 (9th Cir. 1997), and *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1031 (10th Cir. 2001), is misplaced. *California* is at odds with Supreme Court guidance about the political-question doctrine. *See, e.g.*, *Zivotofsky*, 566 U.S. at 195; *J.G.G.*, 2025 WL 914682, at *7 (Henderson, J., concurring) (*California* is "inapposite" and "cuts directly against the government"). *Abbott*'s concurrence bears no relevance—its discussion of "invasion" under the Constitution is inapplicable to the distinct statutory predicate required under the AEA—a question governed by statutory limits that are properly subject to judicial review. 110 F.4th at 728. And *Garvey* supports Petitioners, as that court confirmed it could review whether the FAA acted within the bounds of its statutory and constitutional authority. 256 F.3d at 1031.

channeling provisions of section 1252(a)(4)." *D.V.D.*, 2025 WL 1142968, at *9. Accordingly, "section 1252(a)(4) does not bar review '[w]hen a detained [noncitizen] seeks relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal.'" *Id.*; *see also Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 732 (D.C. Cir. 2022) (reviewing claim that the government could not bypass CAT by using the public health laws). And, of course, no petition for review is available here where the government has plucked Petitioners out of immigration proceedings on the theory that the INA and AEA are "distinct," and claimed the government can remove them without a final order of removal under the INA. Opp. 25.[4]

II. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The Proclamation Fails to Satisfy the AEA.

As this Court has already determined, the Proclamation does not comport with the terms and construction of the AEA. First, the terms invasion and predatory incursion "fundamentally[] demand military and wartime action." TRO Op. 25; *see also J.A.V.*, 2025 WL 1256996, at *15-16 (at the time of the AEA's enactment, the ordinary meaning of "invasion" and "predatory incursion" required entry by a military force or an organized armed force). And "[t]he Proclamation makes no finding that satisfies these definitional demands." TRO Op. 25. Respondents' sweepingly broad definitions of "invasion" and "predatory incursion" find no support in the historical meaning of the statute.[5] Second, the

[4] With respect to CAT, Petitioners ask only that this Court determine Respondents cannot remove them under the AEA without complying with CAT obligations. Only after a determination that the AEA does not override the INA's humanitarian protections could Petitioners then pursue relief on their individual CAT claims in the appropriate forum.

[5] The government cites two cases for the proposition that an "invasion" or "predatory incursion" *includes* military action but is not *limited* to such action. Opp. 18. But both cases

Proclamation "fails to assert a 'foreign nation or government' is 'invading the United States.'" *Id.* at 26. As this Court noted, "there would be no need for [TdA] to 'undertak[e] hostile actions . . . at the direction . . . of the Maduro regime," if TdA was itself a foreign nation or government. *Id.* (quoting Proclamation).

B. The Notice Process Violates the AEA and the Due Process Clause.

The Supreme Court made unequivocally clear that AEA designees are entitled to "due process" and "notice and opportunity to be heard," which includes notice "afforded within a reasonable time and in such a manner as will allow them to *actually* seek habeas relief." *J.G.G.*, 2025 WL 1024097, at *2 (emphasis added). Under no conceivable understanding of the Supreme Court's ruling would the government's English-only notice—that does not inform designees of their right to contest the designation, much less how to do so or how long they have to do so, and does not provide them with the factual basis for their designation—comply. TRO Op. 27-28; *Francis v. Fiacco*, 942 F.3d 126, 143-44 (2d Cir. 2019) ("merely notifying a prisoner . . . and then placing upon him the burden of navigating the legal system, from his prison cell and without counsel, does not satisfy" due process). Even more fundamentally, as noted, the government now states that it will provide just 12 hours to express an intent to file a habeas petition, and 24 hours beyond that to actually file the petition. ECF No. 44-1 (Cisneros Decl.) ¶ 11; *see also Lane Hollow Coal Co. v. Dir., Off. of Workers' Comp. Programs*, 137 F.3d 799, 807 n.14 (4th

---

use those terms in a military sense. *See N.Y. Cent. R. Co. v. Lockwood*, 84 U.S. 357, 375 (1873) (citing *U.S. Express Co. v. Kountze Bros.*, 75 U.S. 342, 345 (1869)) ("incursion" by "predatory band of armed men" while train passed through Missouri, where Confederate rebellion was ongoing, fell under exception to liability for "dangers incidental to a time of war"); *see also J.A.V.*, 2025 WL 1256996, at *15-16 (*Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805), is evidence that "the common usage of 'predatory incursion'" required "a military force or an organized, armed force").

Cir. 1998) (collecting cases holding several days' notice does not satisfy due process).[6]

The government's attempt to analogize to the expedited removal procedures in immigration law is misplaced. Opp. 21-23. Expedited removal is a non-adversarial administrative proceeding where immigration officers generally make simple and frequently uncontested determinations—for example, whether the noncitizen is seeking admission without valid documents. *See* 8 U.S.C. §§ 1225(b)(1)(A)(i), 1182(a)(7).[7]

Finally, Respondents fare no better in arguing that the government may remove individuals without first providing an opportunity for voluntary departure. Opp. 24-25. To the contrary, § 21 affords *all* "alien enemies" the right to voluntary departure rather than facing indefinite detention or forced removal. *See* 50 U.S.C. § 21 (permitting removal of only those who "refuse or neglect to depart"); *U.S. ex rel. Ludwig v. Watkins*, 164 F.2d 556, 457 (2d Cir. 1947) (opportunity to voluntarily depart is a "statutory condition precedent" to the government's right to deport an alien enemy); *see also J.G.G. v. Trump*, --- F. Supp. 3d ---, 2025 WL 890401, at *14 (D.D.C. Mar. 25, 2025). Under § 21, there is

[6] Contrary to the government's argument, Opp. 23, the fact that a tiny handful of individuals (all of whom had counsel) have managed to seek judicial review only underscores that the vast majority have not. For example, of the dozens of detainees at Bluebonnet Detention Center who were given notices on April 17 or 18, *no one* who was previously unrepresented managed to bring their own case.

[7] Moreover, noncitizens who assert a fear of return are entitled to a more substantial procedure including: (1) "information concerning" the asylum screening process and a meaningful opportunity to "consult" with an attorney or other individual in advance, 8 U.S.C. § 1225(b)(1)(B)(iv); (2) a "nonadversarial" interview with a trained asylum officer, 8 C.F.R. § 208.9(b), with a "written record," 8 U.S.C. § 1225(b)(1)(B)(iii)(II), subject to a statutorily mandated "low screening standard," *Grace v. Barr*, 965 F.3d 883, 902 (D.C. Cir. 2020); and (3) review by an immigration judge, 8 C.F.R. § 1208.30(g)(2). Respondents focus on the statutory provision addressing how long the immigration judge should take in concluding that final step, Opp. 22 (quoting 8 U.S.C. § 1225(b)(1)(B)(iii)(III)), but that language about how long the final adjudicator should take says nothing about how much notice noncitizens are entitled. Nothing in this process remotely suggests 12 hours' notice, with no administrative or judicial review, could satisfy due process.

no exception to this right of voluntary departure. *See U.S. ex rel. Von Heymann v. Watkins*, 159 F.2d 650, 653 (2d Cir. 1947) (ongoing detention and forced removal unlawful where it "interferes with" alien enemy's "voluntary departure"). Respondents mistakenly invoke § 22's exception for those "chargeable with actual hostility, or other crime against the public safety." *See* Opp. 24-25. But § 22's exception applies to an entirely separate issue: whether designees receive an additional period of time to settle their affairs in accordance with bilateral treaties or "national hospitality." It does not apply to the baseline requirement of offering voluntary departure under § 21. In any event, § 22 requires a specific, individualized finding—each noncitizen must be "chargeable" with actual hostility or a crime against public safety. *See U.S. ex rel. Kessler v. Watkins*, 163 F.2d 140, 141 (2d Cir. 1947), 163 F.2d at 141 (describing individualized findings on dangerousness). Respondents have made no such showing here, let alone afforded any process to contest such a determination or even one's initial designation under the AEA.

C. The Proclamation Violates Congress's Humanitarian Protections, and INA's Procedural Requirements.

Respondents argue that there is no direct conflict between CAT and removals under the AEA because the United States avoids removals to countries where noncitizens will likely be tortured. Opp. 26-27. But that assertion ignores the extensive evidence about Salvadoran prisons. *See* ECF No. 45-5 (Bishop Decl.); ECF No. 45-6 (Goebertus Decl.). More fundamentally, it ignores the Proclamation's central defect: it categorically forecloses any opportunity to even invoke CAT protections. *See Huisha-Huisha*, 27 F.4th at 731–32. Respondents also incorrectly contend that the INA's procedural mechanisms are irrelevant. Opp. 25. While Congress knew of the AEA when it enacted the INA in 1952, it declined to exclude AEA-based removals from this statutory scheme—even as it carved

out express exceptions elsewhere. *See, e.g.*, 8 U.S.C. §§ 1225(b), 1531.

III. THE COURT MAY ENJOIN TRANSFERS OUT OF THE DISTRICT.

Respondents do not contend that the INA's jurisdictional provisions prevent the Court from prohibiting removals outside the country, but argue they prevent the Court from barring transfers to another district. Even assuming Respondents could transfer people outside of this District, the Court would retain jurisdiction over this case because the class habeas petition and motion for class certification were filed prior to transfer. In any event, as this Court found, Respondents are wrong that the INA's jurisdictional provisions bar this Court from prohibiting transfers within the country. TRO Op. 19-21.

Section 1252(a)(2)(B)(ii) applies only where Congress has "set out the Attorney General's discretionary authority in the statute." *Kucana v. Holder*, 558 U.S. 233, 247 (2010). But § 1231(g) never even mentions "transfer." *See Aguilar v. ICE*, 510 F.3d 1, 20 (1st Cir. 2007); *Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 209-10 (4th Cir. 2019). Even if Respondents attempt to stretch the text beyond its scope to suggest § 1231(g) implicitly includes transfers, it would still not apply because *Kucana* requires statutes to specify that a power is *discretionary*. 558 U.S. at 247. Respondents' reliance on § 1252(g) is likewise incorrect because that provision "applies only to three discrete actions . . . to *'commence* proceedings, *adjudicate* cases, or *execute* removal orders,'" and must be construed narrowly. *Reno v. Am.-Arab Anti-Discrim. Comm. (AADC)*, 525 U.S. 471, 482 (1999).[8] And like § 1252(a)(2)(B)(ii), § 1252(g) only applies to an Attorney General's

[8] Respondents' reliance on the unpublished, non-precedential decision in *Tercero v. Holder*, 510 F. App'x 761 (10th Cir. 2013), is also misplaced. *See* 10th Cir. R. 32.1. The court there cited § 1231(g) without any meaningful analysis, and disregarded *AADC*'s holding that § 1252(g) only applies to decisions to commence proceedings, adjudicate actions, or execute INA removal orders. 525 U.S. at 482. Moreover, *Tercero* involved a

discretionary authority. *Id*. at 483. Transfers are plainly not among the actions to which § 1252(g) applies. *Id*. at 482. And certainly, Respondents have no discretion to violate the statutory and constitutional provisions that Petitioners raise. *See, e.g.*, *Madu v. U.S. Att'y Gen*., 470 F.3d 1362, 1368 (11th Cir. 2006) (1252(g) "does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"); *Garcia v. Att'y Gen*., 553 F.3d 724, 729 (3d Cir. 2009) (challenge to "very *authority*" behind decision to commence proceedings does "not implicate[]" § 1252(g)). Petitioners do not challenge discretionary actions that the provisions are meant to shield from review. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).[9]

If there were any doubt, the All Writs Act permits a court to "enjoin almost any conduct 'which, left unchecked, would have . . . the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.'" *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004). As a practical matter, if Respondents were permitted to transfer Petitioners and class members outside the District to distant detention centers, counsel would face obstacles gathering evidence and presenting facts relevant to the claims here, including whether Petitioners and class members are properly designated under the Proclamation. ECF No. 45-10 (Sherman Decl.) ¶ 6.

IV. EQUITABLE FACTORS WEIGH IN PETITIONERS' FAVOR.

Respondents make no credible attempt to demonstrate a preliminary injunction is unnecessary for Petitioners to avoid "irreparable harm if they are expelled to places where

challenge to a discretionary ICE decision by a pro se plaintiff; Petitioners here challenge the overall AEA scheme as illegal and not discretionary.

[9] Respondents rely heavily on *Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999), Opp. 13-14, but that case was about the availability of attorney's fees for a *Bivens* class action, and in any event predates *Kucana*. *See* TRO Op. 19.

they will be persecuted or tortured." *Huisha-Huisha*, 24 F.4th at 733. Nor can they, given the track record of invoking the AEA to send people to a place where they will face life-threatening conditions, persecution, and torture. *See* TRO Op. 30-31 (finding Petitioners demonstrated irreparable harm). Instead, Respondents rely on their argument that Petitioners are not subject to the Proclamation. But, as this Court has already recognized, TRO Op. 15-16, 30-32, Petitioners face significant risk of reclassification and removal under the Proclamation at the government's whim, with hardly any notice before they would be on a plane to El Salvador.

Conversely, the government can make no comparable claim to harm. *See D.B.U.*, 2025 WL 1233583, at *1 (finding no irreparable harm to government from order restraining AEA removals); TRO Op. 32; *see also J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682, at *11 (D.C. Cir. Mar. 26, 2025) (Henderson, J., concurring).

Respondents' reliance on *Nken v. Holder*, 556 U.S. 418 (2019), Opp. 28, is misplaced.[10] There, the Supreme Court recognized a public interest in preventing immigrants from being wrongfully removed, particularly to countries where they face substantial harm. *Id.* at 436. And, critically, *Nken* relied on the government's concession that individuals could return to the U.S. if they prevailed. *Id.* at 435. But Respondents have expressly disavowed that position for people removed to El Salvador. PI Mot. 5-6.

CONCLUSION

The Court should grant a Preliminary Injunction.[11]

[10] Respondents' other cases, Opp. 27-28, do not advance their position as none concerns irreparable harm.

[11] This Court should continue to exercise discretion to waive bond (or impose nominal bond of $1). Respondents claim a lack of evidence that Petitioners are indigent, Opp. 29, but that is at odds with the simple fact that Petitioners have been incarcerated for months.

Dated: May 2, 2025

Respectfully submitted,

/s/ Lee Gelernt

_____

Lee Gelernt
Daniel Galindo*
Ashley Gorski*
Patrick Toomey*
Sidra Mahfooz*
Omar Jadwat
Hina Shamsi*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2660
lgelernt@aclu.org
dgalindo@aclu.org
agorski@aclu.org
ptoomey@aclu.org
smahfooz@aclu.org
odjadwat@aclu.org
hshamsi@aclu.org

Noelle Smith*
Oscar Sarabia Roman*
My Khanh Ngo*
Cody Wofsy*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104
(415) 343-0770
nsmith@aclu.org
osarabia@aclu.org
mngo@aclu.org
cwofsy@aclu.org

Timothy R. Macdonald
Sara R. Neel
Emma Mclean-Riggs
Anna I. Kurtz
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO

303 E. 17th Avenue
Denver, CO 80203
(303) 777-5482
tmacdonald@aclu-co.org
sneel@aclu-co.org
emcleanriggs@aclu-co.org
akurtz@aclu-co.org

Tamara F. Goodlette
Laura P. Lunn
Monique R. Sherman
Rocky Mountain Immigrant Advocacy Network
tgoodlette@rmian.org
llunn@rmian.org
msherman@rmian.org

Attorneys for Petitioners-Plaintiffs
** Attorney not yet admitted to the District of Colorado*

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2025, I electronically filed the foregoing **REPLY IN SUPPORT OF PETITIONERS-PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system, and that in accordance with Fed. R. Civ. P. 5, all counsel of record shall be served electronically through such filing.

/s/ Sara R. Neel
Sara R. Neel