UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DANIEL ENRIQUE ZACARIAS MATOS,	§	
Petitioner,	§	CIVIL ACTION NO. 1:25-CV-057
v.	§	
FRACISCO VENEGAS, *et al.*,	§	JUDGE FERNANDO RODRIGUEZ, JR.
Respondents.	§	

PETITIONER'S BRIEF IN SUPPORT OF GRANTING THE WRIT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Petitioner files this brief pursuant to the Court's order that he address "whether he is a member of TdA, the standard that the Court should apply in determining whether Petitioner is a member of TdA, whether the Federal Rules of Evidence apply to the evidentiary hearing, and any other issues that Petitioner believes are relevant to the determination of whether he is a member of TdA." ECF 31 at 2. *See also JGG v. Trump*, 604 U.S. __, 2025 WL 1024097, at *2 (2025) ("[A]n individual subject to detention and removal under the [AEA] 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.'") (citing *Ludecke v. Watkins*, 335 U.S. 160, 163-64, 172, n. 17 (1948)).

Pursuant to the Court's order and the Parties' agreement, this brief does not address whether the government has authority to invoke the Alien Enemies Act (AEA) to detain and summarily deport members of Tren de Aragua (TdA). Petitioner maintains that the Court can resolve this case without deciding that question.[1]

---

[1] Should it become necessary, Petitioner intends to argue, *inter alia*, that because the federal government has designated TdA as a foreign terrorist organization pursuant to 8 U.S.C. 1189, the statutes governing detention and removal of TdA members are those enacted by the same Congress that enacted Section 1189 itself. *See generally* 8 U.S.C. 1531, et seq. (establishing Alien Terrorist Removal Court (ATRC)). In the years since, Congress has supplemented that authority in several respects, including in the USA PATRIOT Act, *see, e.g.*, 8 U.S.C. 1226(c)(1)(D); 8 U.S.C. 1226a; but it has done so within Title 8, which remains the "sole and exclusive" source of authority for the detention and removal of non-citizens from the United States. *See* ECF 1, at 5 (citing 8 U.S.C. 1229a(a)(3)). In contrast, the AEA does not apply here because, *inter alia*, TdA is not a "foreign nation or government" and it has not perpetrated or threatened "an invasion or predatory incursion" into the United States. Moreover, the United States has not declared war on either Venezuela or TdA. While TdA members have engaged in some (disputed) amount of criminal activity in this country, such activity has never been a sufficient basis for summary detention and deportation under military authorities. Petitioner intends to fully brief these legal issues following the conclusion of the evidentiary hearing, should it prove necessary.

STATEMENT OF THE ISSUES

1. Whether Mr. Zacarias Matos is a member of TdA.
2. What standard the Court should apply in determining whether Mr. Zacarias Matos is a member of TdA.
3. What procedural protections should apply to the forthcoming evidentiary hearing, including whether the Federal Rules of Evidence apply.
4. Whether the government must provide notice if they intend to send Mr. Zacarias Matos to CECOT, if doing so would be tantamount to punishment.[2]

SUMMARY OF ARGUMENT

1. Mr. Zacarias Matos is not now and has never been a member of Tren de Aragua (TdA). He is the single father of a young child who has never been convicted of any crime, but is now caught in a horrifying mistake. Exhibit 1, Declaration of Daniel Enrique Zacarias Matos ("Mr. Zacarias Matos Decl."). Mr. Zacarias Matos's tattoos, which he got nearly a decade before TdA was founded, do not signify TdA membership. They refer (loosely speaking) to his family and a Puerto Rican pop musician. Moreover, TdA does not use tattoos to signify membership. Exhibit 2, Expert Declaration of Professor Andrés Antillano ("Prof. Antillano Decl.") at ¶¶ 16; 20. Nor is there anything else in Mr. Zacarias Matos's background, including where he grew up, spent time, or the route by which he came to this country, that indicates he might have been recruited by TdA. *Id.* at ¶¶ 17-19. *See infra* Section I.

2. The Court should apply a "clear, unequivocal, and convincing evidence" standard when determining whether the government has borne its burden to establish TdA membership. That

[2] This is another "issue[]Petitioner believes [is] relevant" in this context, because it bears on the procedures this Court must provide to Petitioner.

standard follows logically from the Supreme Court's reference to the due process doctrine governing removal proceedings in *JGG*. See *Trump v. JGG*, 604 U.S. ---, 2025 WL 1024097, *2 (2025) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). *See also Woodby v. INS*, 385 U.S. 276, 277 (1966) (requiring "clear, unequivocal, and convincing" evidence in deportation proceedings). *See infra* Section II.

This would also be the appropriate standard were the Court to determine what standard to apply from first principles. *See generally Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) (applying interest balancing test under *Mathews v. Edridge*, 424 U.S. 319 (1976) to determine process due to U.S. citizen captured on battlefield fighting for the Taliban). *See infra* Section II.C. The stakes could not be higher for Mr. Zacarias Matos, who faces prolonged confinement, removal to Venezuela (itself an extremely repressive nation), and possibly banishment to CECOT, a notorious maximum security prison in El Salvador rife with human rights abuses. In addition, the risk of erroneous mis-identification as a TdA member is extraordinarily high given the total absence of process utilized by the government, as a mounting number of mistakes (like in this case) already show. Finally, while the government of course has a compelling interest in the actual wartime detention of enemy combatants, here it has completely failed to show that any security concern cannot be managed through normal criminal processes or the substantial authority at its disposal under Title 8 of the U.S. Code.

The Court owes no deference to the government's threshold determination of TdA membership. The government has made membership the predicate for application of its Alien Enemies Act authorities, just as the statute normally makes citizenship in an enemy nation the relevant predicate. Petitioner's review of cases concerning prior AEA invocations suggests that courts generally accorded no significant deference to the government on this threshold question.

Moreover, here the government made the TdA determination without any meaningful procedures to safeguard against error, including without *any* form of notice and *any* opportunity to be heard in response to the allegations. Therefore, under traditional habeas doctrine, the government is entitled to no deference on that question. *See infra* Section III.

3. The Court should apply the Federal Rules of Evidence to these proceedings, both because they are the default rules that govern in the absence of other authority displacing them, and because the profound stakes for Mr. Zacarias Matos warrant their use. In addition, Mr. Zacarias Matos is entitled to additional bedrock due process protections, including notice of the actual evidence against him; an opportunity to rebut that evidence through cross-examination of any witnesses the government presents; an opportunity to present his own evidence and call and examine witnesses; and some opportunity for discovery. *See infra* Section IV.

Finally, should the Court ultimately find that Petitioner is a member of TdA, it should require the government to specify whether it intends to send him to CECOT rather than deport him to Venezuela (or detain him in some other civil detention facility) because imprisonment at CECOT constitutes punishment, which cannot be imposed without providing all the protections available under the Fifth and Sixth Amendments. *Wong Wing v. United States*, 163 U.S. 228 (1896) (striking down imprisonment without trial of individuals already ordered removed). *See infra* Section V.

ARGUMENT

I. Mr. Zacarias Matos is Not, and Has Never Been a Member of Tren de Aragua.

Mr. Zacarias Matos is not now and has never been a member of TdA, nor has he had any other connection to TdA in any form. His declaration states this unequivocally, and also describes in relevant part the reasons he was forced to flee to the United States after facing repression from the Maduro regime in Venezuela and the paramilitary organizations (known as "colectivos") that

targeted him and his family members because of their successful business and opposition to the regime. Exh. 1, Mr. Zacarias Matos Decl. at ¶ 6.

In the full month since this Court stopped the government from sending Mr. Zacarias Matos to a high security prison in El Salvador, *see* ECF 2, Temporary Restraining Order, the government has not provided Mr. Zacarias Matos, his counsel, or this Court with any evidence to substantiate its claim that he is a TdA member beyond the bare description of him as a "a member of the class described by [the *JGG*] Order" *see* ECF 6, at ¶ 7, and the equally unsupported claim on a government form stating he "has gang affiliations to Tren de Aragua."[3] Between them, these fifteen words constitute the sum total of the explanation the government has given for summarily jailing and expelling him. Absent the presentation of some actual evidence, this Court should grant the writ.

To the extent the government's allegations are based on Petitioner's tattoos (as they apparently have been in other cases), that is an entirely inadequate basis on which to establish TdA membership in this case (or any other). As Professor Antillano, an expert who has studied Tren de Aragua in depth, explains: "The use of tattoos does not identify anyone as a member of Tren de Aragua. Tren de Aragua does not require tattoos or the use of specific tattoos to be a member." Exh. 2, Prof. Antillano Expert Decl. at ¶ 20. Moreover, many Venezuelans who have no connection to criminal activity choose to get tattoos for various reasons, rendering them a wholly inadequate basis for assessing TdA membership. *Id.* In keeping with that extremely common practice, Mr. Zacarias Matos got all of his tattoos in 2006, many years before the primary organization of TdA as a group, which began to occur around 2015. *Id.* at ¶ 11. He had his tattoos done at the age of 21

[3] The DHS Form I-213, Record of Deportable/Inadmissible Alien, was filed by the government in Mr. Zacarias Matos's sealed A-file, ECF 10, 19-22.

because his friend got a tattoo gun. Exh. 1, Mr. Zacarias Matos Decl. at ¶¶ 37-38. Each tattoo signifies only something that mattered to Mr. Zacarias Matos, at age 21, for artistic or sentimental reasons. For example, one document in Mr. Zacarias Matos's immigration file notes that he has a tattoo of a gun. ECF 10, at 19. He had that tattoo made in reference to a Puerto Rican rap singer who was one of his favorite artists when he was 21. Exh. 1, Mr. Zacarias Matos Decl. at ¶ 39.

Neither the bald assertion on an ICE form that Mr. Zacarias Matos "has gang affiliations to Tren de Aragua," nor the equally-unexplained assertion, a few lines down on the same form, that he "*potentially* has ties" to TdA, suffice to authorize his detention. *See* ECF 10, at 22 (emphasis added). Whatever the terms "affiliations" or "potential[] ties" mean in this context, the President's Proclamation authorizes the detention only of TdA "members," and these statements do not allege that Petitioner is a TdA member. *See* Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 14, 2025) (authorizing summary detention and removal only of "Venezuelan citizens 14 years of age or older *who are members of TdA*" (emphasis added); *cf.* Exhibit 4, Transcript of Motion Hearing, at 13-14, *Gil Rojas v. Venegas*, 1:25-cv-056 (S.D. TX Apr. 2, 2025) (ordering release after court asked government attorney if they had any evidence Petitioner was a member of TdA, and attorney responded, "I do not").[4]

The record discloses no other conceivable basis for treating Petitioner as a TdA member. He has no criminal convictions either here or in Venezuela. Exh. 1, Mr. Zacarias Matos Decl. at ¶ 3. He has been arrested once in the U.S. (outside of the immigration context) with misdemeanor charges that were since dismissed. *Id.* at ¶ 34. His declaration recounts this incident from his

[4] Were the government to produce a witness who would actually testify that Mr. Zacarias Matos is a TdA member, counsel would of course be entitled to cross examine such witness as to the basis for that assertion. *See* Fed. R. Evid. 614(a) ("Each party is entitled to cross-examine the witness"); *see also infra* Section IV.

perspective. That the state criminal system dismissed it should more than suffice to establish its irrelevance for purposes of this case, but whether or not the government agrees, there should be no dispute that nothing in the criminal complaints even remotely suggests that he is a TdA member. *See* Exhibit 3, Criminal Complaints.[5]

Apart from the complete lack of evidence even suggesting, let alone establishing, that Mr. Zacarias Matos is a TdA member, his background makes it highly unlikely that the gang would have recruited him. As Professor Antillano concluded, "[b]ased on the available information and my knowledge of the operation and location Tren de Aragua, there appears to be no evidence linking Daniel Zacarías to this organization." Exh. 2, Prof. Antillano Expert Decl. at ¶17. Specifically, he noted, Mr. Zacarias Matos is from Maracaibo, the capital of the state Zulia, and, based on TdA's geographic presence in Venezuela, it is "unlikely that someone from Zulia would have been recruited by this organization in Venezuela." *Id.* at ¶17. Additionally, Professor Antillano noted, because Mr. Zacarias Matos has no prior criminal history and spent no time in the Tocorón prison where TdA frequently recruited, there "appears to be no information linking Daniel to this prison or this prison gang." *Id.*. at ¶ 18. Mr. Zacarias Matos also has not spent any significant time in countries with a substantial TdA presence, and his travel from Venezuela to the U.S. "did not

[5] In Mr. Zacarias Matos's most recent I-213, ICE officers provided a different narrative about this arrest, albeit without any foundation to establish from where their account derives. Under that version, the person driving the car (in which Mr. Zacarias Matos was a passenger) was a member of a gang (the Crips, not TdA). ECF 10 at 22. In addition, according to the account on this form Mr. Zacarias Matos discarded a pistol immediately before he was arrested. *Id.* However, the criminal complaints in his case makes no mention either of the driver's alleged membership in the Crips or of Mr. Zacarias Matos's having discarded a gun. *See* Exh. 3, Criminal Complaints. Moreover, Mr. Zacarias was never charged with an offense related to firearms. *Id.* In any event, the government has not presented these facts in any admissible form, and even if established they would not constitute evidence that Mr. Zacarias Matos is a member of TdA.

take him through any country where there are groups associated with Tren de Aragua with criminal capacity." *Id.* at ¶ 19.

II. This Court Should Require the Government to Establish Petitioner's Membership in Tren de Aragua by "Clear, Unequivocal, and Convincing" Evidence.

Under governing due process doctrine, this Court should require the government to show Mr. Zacarias Matos is a member of the Tren de Aragua gang by "clear, unequivocal, and convincing" evidence, or, at a minimum, by "clear and convincing" evidence. Those are the constitutional standards governing removal proceedings and other proceedings of comparable gravity. *See generally Woodby v. INS*, 385 U.S. 276, 277 (1966); *Schneiderman v. U.S.*, 320 U.S. 118, 159 (1943); *Nishikawa v. Dulles*, 356 U.S. 129, 137-138 (1958).

A. Threshold Considerations Warrant Application of Standard Due Process Doctrine Governing Deportation and Non-Criminal Detention

Three threshold considerations support application of these cases. *First*, the Supreme Court recently held as to this same invocation of wartime detention authority that "the Fifth Amendment entitles [noncitizens] to due process of law." *Trump v. JGG*, 604 U.S. ---, 2025 WL 1024097, *2 (2025). To support that proposition, the Court cited *Reno v. Flores*, 507 U.S. 292, 306 (1993), a civil immigration detention case, thus suggesting that standard due process doctrine applicable to non-citizens in removal proceedings should govern here. And while the Court also noted that due process should be "appropriate to the case," even for individuals detained as enemy combatants at Guantánamo Bay—who, on the government's view, lacked due process rights—both the federal courts and the government's own procedures required that the government bear the burden of proof and establish the threshold facts justifying detention by a preponderance of evidence. That standard applied on habeas review even though those individuals had been found detainable through an administrative process far more robust than that utilized here. *See Parhat v. Gates*, 532 F.3d 834,

854 (D.C. Cir. 2008) (ordering the government "to release or to transfer" alleged enemy combatant from Guantánamo Bay because government failed to prove elements needed for detention by preponderance of evidence).[6] It follows that far more should be required for individuals arrested on U.S. soil and who have been afforded no process prior to this Court's inquiry.

Second, under longstanding doctrine governing confinement in any form, the Supreme Court has recognized that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). For this reason, "civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protections." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (holding that "clear and convincing" standard should apply) (emphasis added).

Third, that Petitioner is not a U.S. citizen is irrelevant for these purposes. *Zadvydas* involved non-citizens—indeed, unlike Petitioner they were already ordered removed. Its reasoning reflects the basic fact that the text of the Due Process Clause protects "person[s]," not just citizens, and that its protections apply, "[e]ven to one whose presence in this country is unlawful, involuntary, or transitory." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). Accordingly, even as a noncitizen and despite the government's invocation of wartime authority, Mr. Zacarias Matos is

---

[6] *See* Deputy Secretary of Defense, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (July 14, 2005), *available at* https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Detainne_Related/04-F-0269_Implementation_of_Combatant_Status_Review_Tribunal_Procedures_for_Enemy_Combatants_Detained_at_US_Naval_Base_Guantanamo_Bay_Cuba.pdf. (creating internal review process).

entitled to the full protections of the Due Process Clause of the Fifth Amendment. *JGG*, 2025 WL 1024097, at *2.

B. Under Standard Deportation and Detention Doctrine, the "Clear, Unequivocal, and Convincing" Evidence Standard Should Apply

With these considerations in mind, the default constitutional burden of proof governing deportation proceedings should apply here, under which the government must prove its case by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 277 (1966). This same standard also applies in denaturalization proceedings, *Schneiderman v. U.S.*, 320 U.S. 118, 135 (1943), and in expatriation cases. *Nishikawa v. Dulles*, 356 U.S. 129, 137-138 (1958).

The "clear, unequivocal, and convincing evidence" standard is more appropriate here than a mere "clear and convincing evidence" standard because of the factual nature of the inquiry and the severity of the stakes.[7] *Addington* found "clear and convincing" an appropriate standard for civil commitment based on serious mental disorders because the "uncertainties of psychiatric diagnosis" require the lower "clear and convincing" standard so as to not "impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." 441 U.S. at 433. In contrast, the Court noted, "[t]he issues in *Schneiderman* and *Woodby*," "were basically factual and therefore susceptible of objective proof and consequences to the individual were unusually drastic—loss of citizenship and expulsion from the United States." *Id.* at 432. Here, the central question is whether Mr. Zacarias Matos is or is not a member of TdA, a "basically factual" question far more "susceptible of objective proof" than would be a mental health diagnosis. And the consequences of which are "unusually drastic." *See id.* Accordingly, the

[7] There is some disagreement in other circuits over the nature of the difference between these two standards. *Compare Mondeca-Vega v. Lynch*, 808 F.3d 413 (9th Cir. 2015) (en banc) *with Rosa v. Bondi*, 131 F.4th 44, 48-49 (1st Cir. 2025); *Ward v. Holder*, 773 F.3d 601, 604 (6th Cir. 2013).

appropriate standard is that the government must prove its case by "clear, unequivocal, and convincing" evidence. At minimum, it should bear the burden by "clear and convincing" evidence. Under *Addington*, that is the minimum default burden of proof where substantial liberty interests are at stake. *See id.* at 433.[8]

Under either standard, the government must present overwhelming evidence to prevail. Clear and convincing evidence must be "so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts." *Galaviz v. Reyes*, 95 F.4th 246, 256 (5th Cir. 2024) (quoting *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992)). "Mere speculation" cannot satisfy this burden. *Id. See also Schneiderman*, 320 U.S. at 135 (clear, unequivocal, and convincing evidence "does not leave the issue in doubt").

C. Should the Court Apply *Mathews v. Eldridge*, the Standard Would Be the Same

Finally, it bears mention that the analysis above accords with the result the Court would reach should it choose to analyze the question by applying the basic balancing approach of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under that approach, the Court should weigh the individual's liberty interest, the Government's asserted interest and the burdens associated with providing greater process, and the probable value, if any, of additional or substitute procedural safeguards. *Hamdi*, 542 U.S. at 529 (plurality) (citing *Mathews*).

The liberty interest for Mr. Zacarias Matos here is truly profound, for three reasons. *First*, a finding that he is a TdA Member could at a minimum mean prolonged incarceration. Detention under the Alien Enemies Act can last for the duration of the conflict. Here, the President has

---

[8] The government may argue for a lower burden of proof based on the *Hamdi* plurality's refusal to decide that question. See 542 U.S. 507. But *Hamdi*'s analysis turned on the fact that Mr. Hamdi was captured on an actual battlefield, "half a world away" amidst "the rubble of war." *Id.* at 532. There is no reason to believe the same considerations should govern here.

determined that current border crossing numbers along the southern border qualify as an "invasion," and that this determination shall continue until he "determine[s] that the invasion has concluded." Proclamation No. 10888, 90 Fed. Reg. 8333 (Jan. 20, 2025). That March 2025 "recorded the lowest southwest border crossings in history" has apparently not shown that the invasion is over, at least in the government's view.[9] Petitioner's view is that in fact there has never been any invasion, but if one takes the government's position on its own terms, and if the lowest number of border crossings *in history* continues to qualify as an "invasion," it is unclear when the government's current invocation of the AEA predicated on this alleged "invasion" will ever end.

Second, a finding of TdA membership could subject Petitioner to summary deportation to Venezuela, a highly repressive nation that he fled after state security forces repeatedly subjected him to torture, *see* Exh. 1, Mr. Zacarias Matos Decl. at ¶¶ 5-20. . Indeed, this Administration recently recognized the repressive human rights climate there, *see* Continuation of the National Emergency With Respect to Venezuela, 90 Fed. Reg. 1101 (Feb. 27, 2025); and the State Department still strongly advises against any travel there. *See NTPSA v. Noem*, --- F. Supp.3d ---, 2025 WL 957677, at *1 (N.D. Cal. 2025) (citing current State Department Level 4 Do Not Travel advisory). The government has not disputed in this proceeding that Mr. Zacarias Matos could face torture again in Venezuela. For that reason as well, his liberty interests in this proceeding are profound.[10]

---

[9] U.S. Customs and Border Protection, March numbers show most secure border in history (Apr. 1, 2025), *available at* https://www.cbp.gov/newsroom/national-media-release/march-numbers-show-most-secure-border-history-operational-control.

[10] Should this Court find that he is a TdA member and otherwise authorize the use of Alien Enemies Act authority against him, Petitioner would argue that the Act does not displace the Refugee Convention and Convention Against Torture, and therefore that he cannot be removed to Venezuela or sent to prison in El Salvador even if he is deemed a TdA member. *See* 8 U.S.C. 1231(b)(3); *see also* Note to 8 U.S.C. 1231.

Third, the government has yet to rule out banishing him to CECOT, a notorious prison in El Salvador, where he would face conditions that constitute both punishment and torture. *See infra* Section V. It should go without saying that the possibility of being sent to that place triggers liberty interests of the highest order.

Mathews also requires consideration of the probable value of additional safeguards. Here, the additional safeguards Petitioner seeks would be enormously valuable, as the many mistakes the government has already made show. Since the government's deportation of 238 men to CECOT on March 15, early reporting has already revealed that the government erred in several of its TdA membership determinations.[11] The government has itself admitted to wrongfully deporting at least one individual, Kilmar Abrego Garcia, to CECOT due to "administrative error" that it has thus far not agreed to correct. *Noem v. Abrego Garcia*, 604 U.S. ---, 2025 WL 1077101, *1 (2025).[12] But

---

[11] *See, e.g.*, Cecilia Vega, Aliza Chasan, Camilo Montoya-Galvez, Andy Court, & Annabelle Hanflig, *Trump administration deports gay makeup artist to prison in El Salvador*, CBS News (April 6, 2025), https://www.cbsnews.com/news/venezuelan-migrants-deportations-el-salvador-prison-60-minutes/; All in with Chris Hayes, '*Incredible': Trump admin reportedly deports man over autism awareness tattoo*, MSNBC (Mar. 27, 2025); Stefano Pozzebon & Max Saltman, *He has a tattoo celebrating Real Madrid. His lawyer believes it's why he was deported.*, CNN (Mar. 26, 2025), https://www.cnn.com/2025/03/26/americas/deported-real-madrid-tattoo-latam-intl/index.html; Tom Phillips & Clavel Rangel, *'Deported because of his tattoos': has the US targeted Venezuelans for their body art?* The Guardian (Mar. 20, 2025), https://www.theguardian.com/us-news/2025/mar/20/deported-because-of-his-tattoos-has-the-us-targeted-venezuelans-for-their-body-art.

[12] Despite this, and despite the Supreme Court's decision affirming the order requiring that the government "facilitate" Mr. Abrego Garcia's return, it remains unclear whether the government can and will in fact ensure his return. *See* Steve Thompson, Katie Mettler, & Victoria Bisset, *Justice Dept. skirts judge's deadline on plans to return wrongfully deported man*, Wash. Post (Apr. 11, 2025), https://www.washingtonpost.com/immigration/2025/04/11/kilmar-abrego-garcia-el-salvador-deported-case/. *See also* Daniella Silva, *Why experts fear the men who were sent to El Salvador's megaprison may never make it out*, NBC News (Mar. 20, 2025), https://www.nbcnews.com/news/us-news/venezuelans-deported-el-salvador-detention-abuses-rcna197125.

for this Court's timely TRO ruling, Mr. Zacarias Matos would already be an example of another such horrifying cautionary tale.

On the other side of the ledger, while the government's interest in actual wartime detention is of course substantial, *Hamdi*, 542 U.S. at 531-532, this is not wartime detention in any normal sense. While the Court has deferred decision on whether the government has authority to invoke the Alien Enemies Act at this stage of this case, there should be no serious dispute that the government's interests in wartime detention are severely attenuated where, as here, it has not explained why the harms it seeks to address could not be managed either through the normal criminal legal system or through the government's expansive Title 8 authority in this context, including the Alien Terrorist Removal Court. *See* 8 U.S.C. 1531, et seq. Indeed, the Proclamation itself cites mere criminal activity (not war or combat) as justification for its invocation. Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 14, 2025) (describing TdA's involvement in several kinds of criminal activity).

The availability of criminal and immigration process to address the government's concerns diminishes its interests significantly. *See Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting) (arguing that preventive detention was impermissible because detainee could be tried for treason based on allegations used to justify his detention); *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992) (rejecting preventive civil detention of individual with anti-social personality because "the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction"). *Cf. NTPSA v. Noem*, --- F. Supp.3d ---, 2025 WL 957677, at *26 (N.D. Cal. 2025) (on motion for preliminary relief, finding government's mass revocation of Temporary Protected Status for Venezuelans likely unlawful on "national interest" grounds where government had not shown ordinary criminal process insufficient to address any safety concerns).

Therefore, consistent with longstanding due process principles, this Court should require that the government prove TdA membership by clear, unequivocal, and convincing evidence.

III. The Government Is Not Entitled to Deference on the Question of Whether Petitioner Is A Member of TdA.

The Court should afford no deference to the government with respect to its determination of TdA membership, for two principal reasons. *First*, because the Proclamation makes membership in TdA the relevant factual predicate for invocation of the government's wartime authorities, it is analogous to nationality determinations made under previous invocations of the Alien Enemies Act. Those invocations authorized restrictions on all foreign nationals from enemy nations, just as here the invocation authorizes restrictions on all members of TdA.[13]

As the Supreme Court already recognized in *JGG*, a review of nationality claims litigated under prior invocations of the Alien Enemies Act shows that federal courts reviewed the claims of individuals challenging whether they were indeed nationals of enemy nations. 2025 WL 1024097, at *2. (requiring review of "whether [petitioner] 'is in fact an alien enemy fourteen years of age or older.'") (citing *Ludecke v. Watkins*, 335 U.S. 160, 163-64, 172, n. 17 (1948)); *see also Ludecke*, 335 U.S. at 165, n.8 (collecting cases). While the relevant cases of which counsel are aware do not explicitly address what level of deference, if any, the court gave to the government's nationality determination, a review of the opinions themselves reveals no substantial deference. For example, in *Bauer v. Watkins*, 171 F.2d 492, 494 (2d Cir. 1948), Judge Learned Hand, writing for the Second Circuit, ruled that a district court had erred in denying habeas relief on a disputed nationality claim, holding that the government bears the burden of proof on whether petitioner is "native or citizen

[13] *See Lockington v. Smith*, 15 F. Cas. 758, 758-759 (C.C.D. Pa. 1817) (discussing the War of 1812 proclamation); Proclamation, 40 Stat. 1651 (1917) (World War I); Proclamation: Alien Enemies—Japanese, 6 Fed. Reg. 6,321 (Dec. 10, 1941) (World War II)..Of course, that difference also suggests that the invocation is not authorized at all. *See supra* n.1

or Germany." *Id.; see also U.S. ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 901-03 (2d Cir. 1943) (rejecting government requests for deference on several nationality-related issues, finding petitioner was not a German citizen, and reversing denial of writ); *Banning v. Penrose*, 255 F. 159 (N.D. Ga. 1919) (upon thorough review of record, rejecting government's claim that petitioner was German, either because he failed to naturalize or had renounced his U.S. citizenship, and granting writ). *Ex parte Gilroy*, 257 F. 110, 112–13 (S.D.N.Y. 1919) (extensively reviewing and reversing nationality determination); *Ex parte Fronklin*, 253 F. 984 (N.D. Miss. 1918) (reviewing evidence before concluding "[f]rom the evidence as a whole, I am convinced that the petitioner was born in Hamburg, Germany, and is a German alien enemy).

Second, the Court should accord no deference to the government's prior TdA membership determination here because Petitioner received no meaningful process by which to contest that initial agency finding. Even as early as the World War I invocation, which occurred prior to the development of modern due process doctrine, courts did not defer to executive determinations that did not provide for a hearing. *See, e.g.*, *Gilroy*, 257 F. at 112–13 ("The decisions in which the courts have declined to review the determination of executive officials have been in cases where the executive or administrative act followed as the result of some hearing, sometimes formal, sometimes informal, but nevertheless a hearing.").

That approach also accords with longstanding general principles of habeas doctrine, under which "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings." *Boumediene v. Bush*, 553 U.S. 723, 781 (2008); *see also id.* ("What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."). The government provided *far* more process to detained enemy non-citizens during World War II that it has provided here. *See generally JGG v. Trump*, No. 25-5067, 2025 WL 914682, *16 (D.C.

Cir. Mar. 26, 2025) (Millett, J., concurring) (recounting history of judicial review and hearing board processes). There, the government established "Alien Enemy Hearing Boards" which were made up of three civilians. The Boards provided notice and hearings to people alleged to be "alien enemies,"[14] and then issued a recommendation to the Attorney General on the person's dangerousness. That dangerousness assessment was in turn relevant to what constraints on the individual's liberty would ultimately be imposed.[15] Reviewing courts did not defer substantially to executive determinations on the question of nationality. *See also Ludecke*, 335 U.S. at 172 (noting the role of Hearing Boards)

IV. Petitioner Is Entitled to Robust Procedural Protections In These Proceedings

Given the stakes involved, it is clear that Mr. Zacarias Matos is entitled to robust procedural protections with respect to the government's assertion that he is a member of TdA. Due process requires at a bare minimum that Mr. Zacarias Matos receive meaningful notice of the evidence against him, and a "meaningful opportunity to contest the factual basis for [his] detention." *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality).

Here, two threshold considerations warrant extremely rigorous procedures. *First*, Mr. Zacarias Matos does not face traditional wartime detention after capture on a battlefield. Instead, he faces possible indefinite incarceration, deportation to a country he has fled due to threats to his life, and conceivably even transportation to a notorious prison facility in El Salvador. Under such circumstances, the procedures governing this Court's evidentiary hearing on TdA membership should be trial-like in their rigor. *See generally Townsend v. Sain*, 372 U.S. 293 (1963)

---

[14] *See* Department of Justice, *Statement Announcing the Estatement of the Enemy Alien Hearing Boards* (Dec. 29, 1941), *available at* https://digitalcollections.lib.washington.edu/digital/collection/pioneerlife/id/17306.

[15] *Id.*

(emphasizing trial-like procedures required in cases challenging unconstitutional detention involving state prisoners); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (rigor of procedures varies in part based on the severity of the deprivation at issue).

Second, thus far the government has provided *no process at all* in determining that Petitioner is a TdA member (if in fact it has even made that determination as to him). Mr. Zacarias Matos does not even know why the government believes he is a TdA member (if it does). He has received no opportunity to rebut the allegations before *anyone*, let alone a hearing before a neutral decisionmaker. "Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." *Boumediene*, 553 U.S. at 783.[16]

To effectuate what Due Process commands in this context, Petitioner must receive notice of *all* the allegations against him and *all* the evidence on which the government intends to rely; the right to present evidence, including to present and examine his own witnesses; and discovery if appropriate in light of the evidence the government presents. Those rights are generally available as a matter of course in removal proceedings, where the stakes are often far lower than here. *See* 8 U.S.C. 1229a(b)(4). Secret evidence issues aside, they have also been generally available in habeas proceedings for detained enemy combatants held at Guantánamo Bay. *Boumediene*, 553 U.S. at 790 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court"). And, during prior invocations of the Alien Enemies Act, habeas courts also appear to have utilized similar procedures, including by allowing detainees to present evidence and "by

[16] This case does not present the question whether there must be a right to appointed counsel in these proceedings.

hearing the testimony and arguments." *U.S. ex rel. Zdunic v. Uhl*, 137 F.2d 858, 860 (2d Cir. 1943). In *Zdunic*, for example, the Second Circuit reversed a district court decision that had denied the writ without permitting testimony on a question of citizenship, where the petitioner had put the issue in dispute. The court also found troubling that the petitioner had no opportunity to respond to further information the government presented in its reply brief. *Id.* at 861. The court there also relied on *Walker v. Johnston*, 312 U.S. 275 (1941), which held, in the context of a federal prisoner convicted of a crime, that where the briefing raises a question of fact, the district court *must* hold an evidentiary hearing. Anything less does not "satisfy the command of the [habeas] statute that the judge shall proceed to determine the facts of the case, by hearing the testimony and arguments." *Walker*, 312 U.S. at 285.[17]

In addition, depending on the nature of the evidence the government presents, Petitioner reserves the right to seek leave to take some discovery. As a general matter, discovery is appropriate in habeas cases where it will "allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition." *Harris v. Nelson*, 394 U.S. 286, 298 (1969); *see also Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996) ("When there is a factual dispute, [that,] if resolved in the petitioner's favor, would entitle [him] to relief . . . a federal habeas corpus petitioner is entitled to discovery and an evidentiary hearing." (internal citations omitted)). Indeed, even in habeas cases for enemy combatants held at Guantánamo Bay, courts have permitted the compelled disclosure of evidence, including even classified information, under appropriate circumstances and procedures. *Al Odah v. United States*, 559 F.3d 539, 544–45 (D.C. Cir. 2009) (per curiam) (holding that court may compel disclosure to counsel of classified information for

[17] For purposes of this evidentiary hearing, Petitioner respectfully requests that the Court direct both parties submit witness lists to the Court no later than April 28, 2025.

habeas corpus review); *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (granting counsel access to classified information supporting enemy combatant determination, subject to limited exceptions), *vacated,* 554 U.S. 913 (2008*), reinstated*, 551 F.3d 1068 (D.C. Cir. 2009) (per curiam*)*.

Finally (with respect to procedures), the Federal Rules of Evidence govern these proceedings, because "[they] apply to proceedings before United States district courts." Fed. R. Evid. 1101(a), (e). *See also* Note to Subdivision (d)(2) ("The rule does not exempt habeas corpus proceedings. . . . Hence subdivision (3) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.").

Most important at this stage, this means the hearsay rule must apply in this proceeding. Fed. R. Evid. 801, et seq.; *see also Valdez v. Cokrell*, 274 F.3d 941, 957 (5th Cir. 2001) (in habeas case, holding "[w]e find that the district court properly excluded the report as it was rife with hearsay" (citing Fed. R. Evid. 802)); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005) (in removal proceeding, finding violation of due process where hearsay was admitted). That means the government cannot rely on the general accusatory statements in the I-213 in this case, but instead must produce witnesses who can testify on personal knowledge as to how they know that Mr. Zacarias Matos is in fact a TdA member.

V. Because Banishment to CECOT Constitutes Punishment, If the Government Intends to Send Petitioner There It Must Charge Him with a Crime and Comply with the Fifth and Sixth Amendments.

Finally, should the Court find (after this round of briefing and the evidentiary hearing) that Petitioner is a member of TdA, it should require the government to specify whether it intends to confine Petitioner (or send him to a country where he will be confined) in a *prison*, as opposed to

a civil detention facility (or nowhere, as presumably might occur upon deportation to Venezuela).[18] The Court should impose that requirement because if the conditions under which Petitioner would be held would constitute punishment, then he is entitled to all the protections of the Fifth and Sixth Amendments, including trial by jury and proof of charges beyond a reasonable doubt. *See Wong Wing v. United States*, 163 U.S. 228 (1896) (striking down imprisonment without trial of individuals already ordered removed). While Petitioner does not dispute that longstanding law-of-war principles authorize the confinement of individuals properly deemed enemy combatants, the authority for such detention turns on it being intended only to prevent such individuals from advancing their nation's war against the U.S., not to punish. *See Johnson v. Eisentrager*, 339 U.S. 763, 772-73 (1950) ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts").

In contrast, *punishment* under the law of war can only occur pursuant to duly constituted military authorities. *See generally Hamdan v. Rumsfeld,* 548 U.S. 557, 631 (2006). As *Hamdan* explained, the laws of war prohibit:

> 'the passing of sentences … without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.' [citing Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War] … The provision is part of a treaty the United States has ratified and thus accepted as binding law. … By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses, when committed by or against United States nationals and military personnel.

---

[18] While the government nearly sent Mr. Zacarias Matos to the CECOT prison in El Salvador three weeks ago, it has since sent at least some Venezuelan nationals back to Venezuela. Vanessa Buschschluter, *U.S. Deportations to Venezuela resume after dispute*, BBC (Mar. 24, 2025), https://www.bbc.com/news/articles/cgm1r0wjdyno.

548 U.S. at 642 (Kennedy, J., concurring).

There should be no serious dispute that sending someone to CECOT constitutes punishment. CECOT is not a civil detention center, but instead a maximum security prison in El Salvador. The inhumane conditions there have been well-documented.[19] Detainees share communal cells that can hold up to 100 men where they spend 23.5 hours per day; the cells contain no furniture beyond rows of stacked metal bunks without mattresses or pillows; the lights are always on; and detainees have no access to visits or phone calls with lawyers, family, or community.[20] Indeed, the conditions are so harsh that El Salvador's own justice minister has said the only way out is in a coffin.[21]

To the extent doctrinal analysis is needed to confirm what should be obvious, this Court can apply the factors relevant to assessing whether any given sanction constitutes punishment. Where courts find an *intent* to punish, no further inquiry is needed. *Hopkins v. Watson*, 108 F.4th 371, 383 (5th Cir. 2024) (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)). Here, the government has already made clear that intent. When announcing the arrangement to send people from the United States to the Salvadoran prison known as CECOT, Secretary of State Marco Rubio told reporters that El Salvador had agreed to "accept for deportation any illegal alien in the United States *who is*

---

[19] *See, e.g.*, David Culver, Abel Alvarado, Evelio Contreras, & Rachel Clarke, *In notorious Salvadoran prison, US deportees live in identical cells to convicted gangsters*, CNN (April 8, 2025), https://www.cnn.com/2025/04/08/americas/el-salvador-cecot-prison-deportees/index.html; William Brangham, Ian Couzens, & Shrai Popat, *The conditions inside the infamous El Salvador prison where deported migrants are held*, PBS (April 8, 2025), https://www.pbs.org/newshour/show/the-conditions-inside-the-infamous-el-salvador-prison-where-deported-migrants-are-held.

[20] *Id.*

[21] Cecilia Vega, *U.S. sent 238 migrants to Salvadoran mega-prison; documents indicate most have no apparent criminal records*, CBS News (April 6, 2025), https://www.cbsnews.com/news/what-records-show-about-migrants-sent-to-salvadoran-prison-60-minutes-transcript/.

a criminal from any nationality . . ."[22] President Bukele similarly stated: "[w]e are willing to take in *only convicted criminals* (including convicted US citizens) into our mega-prison (CECOT) in exchange for a fee."[23]

After the flights, the government confirmed that was its intent. DHS Secretary Kristi Noem visited CECOT and filmed a video standing in front of a crowded cell shortly after the flight which Mr. Zacarias Matos narrowly escaped due to this Court's order. In the video, Secretary Noem first thanked El Salvador for accepting alleged TdA members and for "incarcerat[ing] them and to have consequences for the violence that they have perpetuated."[24] She then went on to say: "I also want everybody to know, if you come to our country illegally, this is one of the consequences you might face." [25] She even captioned the video with: "President Trump and I have a clear message to criminal illegal aliens: LEAVE NOW. If you do not leave, we will hunt you down, arrest you, and you could end up in this El Salvadorian prison." [26]

These statements make crystal clear that the government's use of CECOT is to punish—both to seek retribution and to deter, which are traditional aims of punishment. The Supreme Court has made clear that such "general deterrence" justifications are impermissible absent criminal process. *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (warning that civil detention may not

---

[22] Stefano Pozzebon, Jessie Yeung, Marlon Sorto, & Lex Harvey, *El Salvador offers to house violent US criminals and deportees of any nationality in unprecedented deal*, CVV (Feb. 4, 2025), https://www.cnn.com/2025/02/03/americas/el-salvador-migrant-deal-marco-rubio-intl-hnk/index.html (emphasis added).
[23] *Id.* (emphasis added).
[24] Secretary Kristi Noem (@Sec_Noem), X (Mar. 26, 2025), https://x.com/Sec_Noem/status/1905034256826408982?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1905034256826408982%7Ctwgr%5Eb708a860ea8b399d37fa7b73f92abbce2a7f888a%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.thedailybeast.com%2Fkristi-noem-defends-jarring-video-taken-at-el-salvadors-terrorism-confinement-center%2F (last visited Apr. 13, 2025).
[25] *Id.*
[26] *Id.*

"become a 'mechanism for retribution or *general deterrence*'—functions properly those of criminal law, not civil commitment" (quoting *Kansas v. Hendricks*, 521 U.S. 346, 372-73 (1997) (Kennedy, J., concurring)) (emphasis added)); *see Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("[W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone."). *See also RIL-R v. Johnson*, 80 F. Supp. 3d 164, 189 (D.D.C. 2015) (applying these principles to enjoin immigration detention based on deterrence).

Should the Court nonetheless conclude that the government's intent to punish is not clear from its own statements, it could apply the test set forth in *Kennedy v Mendoza-Martinez*, 372 U.S. 144 (1963). Under *Mendoza-Martinez*, courts

> evaluate whether a sanction (1) involves an affirmative disability or restraint; (2) has historically been regarded as a punishment; (3) comes into play only on a finding of scienter; (4) will promote the traditional aims of punishment—retribution and deterrence; (5) applies [to underlying behavior that] is already a crime; (6) has an alternative purpose to which it may rationally be connected; and (7) appears excessive in relation to the alternative purpose assigned.

Hopkins, 108 F.4th at 385-386 (citing *Mendoza-Martinez*, 372 U.S. at 168-69) (internal quotation marks omitted). Under the *Mendoza-Martinez* test, banishment to CECOT clearly constitutes punishment.

The first factor here clearly favors that determination, given the horrific conditions there, which are just as restrictive as those applied to Salvadoran nationals convicted of crimes.[27] These conditions clearly "involve[] an affirmative disability or restraint." *See Hopkins*, 108 F.4th at 385-86. Second, sending Petitioner to CECOT would be a sanction that "has historically been regarded as punishment." *Id.* Prison is the paradigmatic place of punishment. And "devices of banishment

[27] *See supra* n. 19.

and exile have throughout history been used as punishment." *Mendoza-Martinez*, 372 U.S. at 168, n.23 (noting the historic uses of banishment as penal sanctions going back to ancient Rome). Third, banishment to CECOT is based on a "finding of scienter." While prior AEA invocations based on nationality did not include an element of scienter—as citizenship is typically conferred by birth or parentage—TdA *membership* involves a choice, punishment of which is typically the province of criminal law. Fourth, the government clearly intends for its use of CECOT to "promote the traditional aims of punishment—retribution and deterrence," as DHS Secretary Noem has made clear in her statements described above. The final factors similarly support a finding of punishment. The sanction is clearly excessive given that the government already has extensive authority to regulate TdA's conduct via criminal processes and Title 8 authority, *see supra* n.1, and the government's decision to send ostensible civil detainees to a prison rife with human rights abuses is clearly "excessive" in relation to any non-punitive purpose.

Because banishment to CECOT constitutes punishment, the government cannot send Mr. Zacarias Matos there without affording him all the protections of the Fifth and Sixth Amendments. Therefore, the Court should require the government to provide notice of its intent.

CONCLUSION

For these reasons the Court should order that Petitioner be afforded the procedural protections described here; find that he is not a member of TdA; and order his release from custody pursuant to the Alien Enemies Act.

April 14, 2025

Respectfully Submitted
/s/ Jaime Diez
JAIME DIEZ
Attorney
PO BOX 3070

Brownsville, TX 78523
Texas Bar: 00783966
Fed Id.: 23118
(956) 544-3564

AHILAN T. ARULANANTHAM*
Email: arulanantham@law.ucla.edu
CA Bar: 237841
SOFÍA LÓPEZ FRANCO
Email: lopezfranco@law.ucla.edu
Texas Fed. ID No.: 3914762
CA Bar: 354132
Center for Immigration Law and Policy
UCLA SCHOOL OF LAW
385 Charles E. Young Dr. E., Box 951476
Los Angeles, CA 90095
Telephone: (310) 983-3345

**admitted pro hac vice*

CERTIFICATE OF SERVICE

I certify that on April 14, 2025, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also certify that participants are registered CM/ECF users and received service via the CM/ECF system.

/s/ *Sofía López Franco*
Sofía López Franco