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.*,	§	
Respondents.	§	JUDGE FERNANDO RODRIGUEZ, JR.

PETITIONER'S REPLY IN SUPPORT OF GRANTING THE WRIT

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INTRODUCTION

Respondents' constantly-shifting justifications for summarily jailing and attempting to deport Mr. Zacarias Matos have changed yet again. They now disclaim any present interest in treating this single father never convicted of any crime as an "Alien Enemy," suggesting even they do not believe the paltry evidence they have offered to this Court. Nonetheless, they still claim authority to summarily deport him (apparently to anywhere, even CECOT), but now under the expedited removal provisions of Title 8.

This latest legal justification is equally unconvincing. In response to the government's latest maneuvers, Petitioner respectfully requests that the Court take the following steps: *First*, it should hold that sending Petitioner to CECOT would constitute punishment. ECF 33 at 20-25 (citing, *inter alia*, *Wong Wing v. United States*, 163 U.S. 228 (1896)). Respondents effectively concede this point, stating only in passing that Petitioner's fear-based claims under immigration law are protected through other litigation. ECF 35 at 8. But Petitioner's punishment claim rests on the Fifth and Sixth Amendments, not on any immigration law. The Court should take the possibility that Petitioner might be sent to CECOT off the table now, given the uncontested reality that sending him there would violate the constitutional prohibition on punishment without trial.

Second, the Court should not dismiss this case because Petitioner may be a member of the *JAV* class. While Respondents are correct that the Court could choose to postpone resolution of the TdA membership question in this case while it resolves the broader issues concerning Alien Enemies Act authority that are before the Court in the *JAV* class action, resolving the TdA membership question here could render those proceedings irrelevant as to Petitioner. Moreover, the cloud of TdA allegations continues to hover over his immigration case, as the government has

treated him as a security threat for purposes of his expedited removal proceedings. A ruling by this Court that those allegations are unfounded would remove the taint of that accusation.

Third, the Court should either rule now that the government has failed to meet its burden given the paucity of the evidence it has presented to date, or move forward with its scheduled evidentiary hearing to decide whether Petitioner is a member of Tren de Aragua (TdA). Because Respondents have offered no evidence from anyone with personal knowledge of the allegations against Petitioner, the Court can rule now that they have failed to meet their burden. *Sanchez Puentes v. Garite*, No. EP-25-cv-00127-DB, 2025 WL 1203179, at *10 (W.D. Tex. Apr. 25, 2025). ("[E]ven in civil cases where the stakes are lower, the Government's case cannot possibly be based *solely* on hearsay.").

Should the Court choose to move forward with the hearing, Respondent's evidentiary presentation underscores how crucial it will be for this Court to insist upon adherence to the basic due process principles codified in the Federal Rules of Evidence and related rules, both in this case and others. Although ICE has apparently lost confidence in its claim that Petitioner is a TdA member (despite having nearly sent him to CECOT already), Respondents still attempt to smear him with their own accusations, drawing on their account of uncharged conduct presented in declarations littered with double- and triple-hearsay. But the declarants they offer have no personal knowledge of Petitioner whatsoever. From their statements, it appears they were not present when he was arrested, do not appear to have ever questioned him, and were not the ones who allegedly determined he was a TdA member. The Supreme Court has already held that the Due Process Clause must govern these proceedings, and the plain text of the Federal Rules of Evidence makes clear that they too must govern the evidentiary hearing this Court has already set. Those rules do not permit detention based on such meager evidence.

While this Court could reject Respondents' claim on the papers given that the paucity of the evidence they offer, it cannot rule in their favor without holding the hearing it has set for next week. As Petitioner would show at that hearing, Respondents' evidence falls apart under even minimal scrutiny. The criminal complaints from the two charges against Petitioner, both of which were subsequently dismissed, contain none of the allegations on which Respondents base their case. *See* ECF 33-3. The complaints do not state Petitioner discarded a weapon, admitted to being a TdA member "as a kid," or that his tattoo is indicative of such membership. He admitted to *getting the tattoo* as a kid, and publicly-available information shows that the tattoo *was* associated with the Puerto Rican artist Ñengo Flow years before Tren de Aragua came into existence, despite opposing counsel's attempt to show otherwise through their own research—research that the ICE agents apparently never bothered to do.

Opposing counsel's detailed pictorial analysis of Petitioner's gun tattoo also begs a far more important question: where is the evidence that Tren de Aragua members identify themselves with a gun tattoo with "no strap," and "a cross super-imposed over the stock" of the gun, as counsel suggests? ECF 35, at 17. Nothing in this record shows that *any* TdA member in any country on Earth has this allegedly-incriminating tattoo. *Cf.* ECF 33-2, Decl. of Prof. Andrés Antillano at ¶¶ 16, 20 (expert declaration stating that TdA membership is not signified through tattoos). The Due Process Clause does not permit the potentially-indefinite detention of a man with no criminal convictions, separated from his daughter, based on such meager evidence.

Finally, Respondents' separate, novel contention that they can now summarily remove Petitioner under Title 8 expedited removal authority, and that this Court lacks authority to review that decision, is wrong on both counts. In fact, this Court retains authority to put Petitioner in the position he was in before this horrific saga began by requiring Respondents to utilize normal

removal proceedings against him, as they were doing before they marked him for banishment to El Salvador. Respondents' position to the contrary ignores the plain text of the expedited removal statute and the unique procedural history of this case. Petitioner was initially apprehended very shortly after entering, but then DHS officials released him into the United States under the government's parole authority, well over one year ago. That matters because the government has no authority to subject individuals to expedited removal after it has paroled them, as another court recently held. *Doe v. Noem*, No. 1:25-cv-10495-IT, 2025 WL 1099602, *16 (D. Mass. Apr. 14, 2025). Unsurprisingly, while Congress gave DHS broad authority to initiate expedited removal proceedings against qualifying non-citizens, it gave the government no authority to choose *not* to initiate expedited removal proceedings, release on parole, and then change its mind more than a year later.

Respondents' new jurisdiction-stripping argument fails for similar reasons. As Respondents must acknowledge, the provision on which they rely only bars review of claims brought by "individuals … who are subject to removal under Section 1225(b)(1)." ECF 35 at 11. Just as it would not bar this Court from exercising jurisdiction over a habeas petition brought by an engineer or student admitted on a valid visa whom the government tried to put into expedited removal proceedings, so too it does not bar Petitioner's claim in this case, which has nothing to do with his asylum claim, but instead is simply that Congress did not permit DHS to apply the expedited removal statute to people in his position. Reading the jurisdictional provisions of the immigration code expansively to bar such claims would violate both the Due Process Clause and the Suspension Clause.

ARGUMENT

I. This Court Should Hold That Sending Petitioner to CECOT Constitutes Punishment.

Respondents make no attempt to address Petitioner's argument that banishment to CECOT is punishment in violation of the Fifth and Sixth Amendments. *See* ECF 33 at Section V (citing *Wong Wing*, 163 U.S. 228; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)). Because it is punishment, Petitioner cannot be forced to suffer that fate unless he is convicted of a crime. That is true regardless of whether he ultimately loses the right to live here, as did the immigrants in *Wong Wing*, or is properly regarded as an "enemy," as the government contended in *Hamdan*.

Although this Court should proceed to an evidentiary hearing to resolve the TdA membership issue in this case, it should also rule *now* that CECOT is off the table. That ruling would afford Petitioner substantial relief for reasons that should be obvious, even though it would not resolve whether Petitioner remains subject to on-going ICE detention or removal to Venezuela.

II. This Court Should Deny Respondents' Request for Dismissal.

Respondents ask the Court to dismiss these proceedings under *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), because they have not decided whether they still believe that he is a TdA member (if they ever did), and if they eventually do reach that conclusion he "will have the opportunity to challenge it at that time." ECF 35 at 9. Sadly, this Court cannot take that assertion at face value. Petitioner would already be in CECOT but for this Court's emergency after-hours order a few weeks ago, and Respondents' conduct in other cases since that time does not inspire confidence. *See, e.g.*, *AARP v. Trump,* 145 S. Ct. 1034 (Apr. 19, 2025) (Mem.) (emergency after-hours order from Supreme Court directing the government "not to remove any member of the putative class of detainees from the United States until further order"). In other words, Respondents cannot escape a ruling on the legality of their conduct by voluntarily—and temporarily—abandoning their view that he is subject to detention and removal under the Alien Enemies Act. *Compare Bazzrea v. Mayorkas*, 677 F. Supp. 3d 651, 663 (S.D. Tex. 2023)

(voluntary cessation exception did not apply where federal defendants "formally rescinded" the challenged policy).

Respondents also argue for dismissal because the issues in this case are covered by the *JAV* class action, citing caselaw disfavoring individual litigation that overlaps with a class action. ECF 35 at 9-10. But this Court already has both cases, rendering the authority on which Respondents rely inapposite. The primary concerns motivating them are the risk of inconsistent judgments and loss of judicial economy, neither of which is present here . *See Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc) (per curiam) ("To allow individual suits would interfere with the orderly administration of the class action and risk inconsistent adjudications."); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976) (holding case should be dismissed to prevent "inconsistent dispositions of property" resulting from concurrent state court proceedings). Indeed, in the prison litigation that was the subject of *Gillespie*, 858 F.2d at 1102, and *Greene v. McKaskle*, 770 F.2d 445, 446 (5th Cir. 1985), the Fifth Circuit barred individual litigation only because it was occurring before judges who were *not* presiding over the parallel class action. In contrast, the Fifth Circuit *permitted* a separate individual case when the judge presiding over it also had supervisory authority over the parallel class action. *Gates v. Cook*, 376 F.3d 323, 328 (5th Cir. 2004). As *Gates* explained, "the *Gillespie* court was concerned with avoiding the inefficiency of a situation in which multiple courts would be forced to familiarize themselves with the problems of the Texas prison system." *Gates*, 376 F.3d at 329. Where, instead, the district court judge in the individual case assigned a magistrate judge with previous experience in the broader class action challenge to preside over it, the Fifth Circuit permitted both cases to go forward, because doing so did not present "the problem of a new district court being forced to get up to speed on the factually-intensive problems" of the case or "the problem of multiple district

courts simultaneously exercising equitable powers over the prison system." *Id.* Here, as in *Gates*, there is no risk of inconsistent adjudication or inefficiency in permitting both cases to proceed before this Court.

Although Respondents do not request it explicitly, their brief could also be read to suggest that this Court *stay* this case under *Landis* until it resolves the broader Alien Enemies Act authority questions in *JAV*, but that option too would not serve judicial economy. The burden and standard questions are now fully briefed here, and resolution of them could dispose of this case irrespective of how the Court decides *JAV*. Given that the parties have concluded briefing and are scheduled for an evidentiary hearing next week, ECF 31, judicial efficiency counsels *against* a stay. *Compare Colorado River*, 424 U.S. at 820 (affirming district court dismissal in "significant" part due to "apparent absence of any proceedings in the District Court, other than the filing of the complaint," but "not decid[ing]" whether "dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal"); *with Soverain Software LLC v. Amazon.com*, 356 F. Supp. 2d 660, 663 (E.D. Tex. 2005) ("After considering the prejudice to Soverain, the possibility of issue simplification, the resources already invested in this case, and the rapidly approaching trial date, the Court finds a stay this late in the proceedings is inappropriate.").

Because neither the risk of inconsistent outcomes nor judicial efficiency counsels in favor of dismissing or staying this case, the Court should move forward with the scheduled hearing on May 5th. It has been nearly two months since Respondents first attempted to place Petitioner on a plane to CECOT; they should be forced to prove he is a member of TdA.

III. This Court Should Either Rule for Petitioner Now or Proceed with the Evidentiary Hearing Under the Standards Petitioner Advocates.

The evidence Respondents have proffered to date to establish that Petitioner is a TdA member is extraordinarily weak. They themselves refuse to stand by it—stating that they have not

decided to treat him as a TdA member even as they present declarations from ICE officials asserting that other, un-named ICE employees think he is a member. Those declarations, littered with double- and triple-hearsay, come nowhere close to satisfying the government's burden. The Court could rule now that this evidence fails to satisfy the government's burden. If it instead chooses to proceed despite the weakness of this evidence, it vividly illustrates the need for an evidentiary hearing given that Petitioner has unequivocally stated that he has never been a TdA member; was recently found credible by a DHS official interviewing him for purposes of his asylum claim; and has substantial corroborating evidence—including expert testimony—supporting his account.

As to the rules this Court should employ to resolve the parties' factual dispute, this case presents three distinct sets of questions: the standard and burden of proof; what deference is owed the government's TdA membership determination; and what evidentiary rules and procedures should apply (including the hearsay rule, availability of live witness testimony, and at least some discovery). Petitioner maintains that the standard should be clear and convincing evidence; the Court should accord no deference to the TdA determination; and the evidentiary rules are supplied by the Federal Rules of Evidence coupled with some discovery for the gathering of evidence.[1]

Respondents argue for vastly diminished procedural protections, but their argument ignores longstanding precedent and the Supreme Court's recent reference to that precedent in *JGG*. *See* ECF 35 at 18-19. *JGG* specifically referenced the due process requirements for individuals

[1] Petitioner requested that discovery from Respondents on Thursday, but they were unable to provide their position on whether they would disclose it by this morning. As a result, Petitioner has now sought it through a motion filed concurrently with this brief. Additionally, because Respondents' brief argues no live testimony should be required, Petitioner has not shared his witness list with Respondents and this Court. However, Petitioner is prepared to submit his witness list as soon as either Respondents agree to provide theirs or this Court orders the parties to disclose them.

facing removal, and under well-established law the applicable standard in that context is, at minimum, clear and convincing evidence. *See Woodby v. INS*, 385 U.S. 276 (1966) ("clear, unequivocal, and convincing"); 8 U.S.C. 1229a(b)(5)(A); (c)(3)(A). ECF 33 at 8-10. As the district court for the Western District of Texas recently held, the procedural protections Petitioner seeks here—including the "clear, unequivocal, and convincing evidence" standard and the hearsay rule—are those required by law. *Sanchez Puentes*, 2025 WL 1203179, at *9-10.

Respondents do not attempt to reconcile their position with the Supreme Court's citation to the due process rule from removal proceedings, but nonetheless ask this Court to incorporate wholesale the approach suggested by the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004). That argument is meritless. Even if the *Hamdi* plurality decision were binding precedent (which it is not), the rationale it advanced for lowering the standard of review obviously would not apply here. The El Paso Police officers and ICE officials who have personal knowledge of the circumstances surrounding Petitioner's arrest and alleged TdA identification obviously could testify here without compromising battlefield operations or anything of the kind.

A. The Proffered Evidence Thus Far Shows Petitioner is Not a TdA Member and Confirms that Respondents Cannot Prevail Without an Evidentiary Hearing.

The weight of the parties' evidentiary presentations to date show that Petitioner is not a TdA member; at minimum they confirm the need for a hearing with live testimony before banishing Mr. Zacarias Matos. Petitioner has stated unambiguously that he is not and never has been a TdA member. *See* ECF 33-1, at ¶ 2. Since that time an asylum officer found him credible in an interview concerning his fear of return to Venezuela (despite denying his claim for reasons unrelated to his credibility). *See* Exhibit 10 at 20 (results from CFI).

Petitioner is also prepared to present the testimony of Professor Antillano, a Venezuelan expert with deep knowledge of Tren de Aragua, who would testify consistent with his declaration

that TdA does not use tattoos to signify membership; and that Mr. Zacarias Matos's background suggests he is not a TdA member. *See* ECF 33-2. Petitioner can also offer corroboration for his perfectly straightforward explanation for his gun tattoo, which refers to the Puerto Rican singer Ñengo Flow. Contrary to government counsel's own research, publicly-available images of the singer's iconography show he used gun imagery for years before Tren de Aragua came into existence. *See* Exhibit 8, Declaration of Julia Lynn Randolph of April 28, 2025. Mr. Zacarias Matos would also testify, consistent with his Supplemental Declaration, that he got the tattoo of the flower and stars on his shoulder, which says the name "Iris" on it, for his mother, who was named Iris. *See* Exhibit 6, Supplemental Declaration of Mr. Zacarias Matos.

The Court should not reject all this evidence and permit Mr. Zacarias Matos's potentially-indefinite detention without assessing the credibility of the relevant parties, including the government's witnesses who implicitly assert that Mr. Zacarias is not being truthful on the basic question of whether he is a TdA member.

The declarations Respondents are weak enough to justify a determination that the government has already failed to carry its burden of proof, as it appears no one in the government is willing to swear on the record that they themselves have determined that Mr. Zacarias Matos is a TdA member. At minimum, the declarations that Respondents have proffered to date vividly illustrate why this Court must insist on compliance with the rules of evidence, and in particular the hearsay rule. Respondents' brief boldly asserts Mr. Zacarias Matos *is* a TdA member based on the evidence they have presented, ECF 35 at 6, but their submission does not include a declaration from *anyone* who has made that determination. Instead, the two declarations they offer are littered

with double- and even triple-hearsay.[2] Respondents never explain why they failed to provide declarations from the individual ICE and El Paso Police officers to whom these declarations repeatedly refer—i.e., those with *personal knowledge*. *Cf.* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). Nor do they suggest the individuals with personal knowledge would be unavailable to testify even for mundane reasons, let alone for reasons compelling enough to justify deviation from the hearsay rule, such as the need to engage in armed combat in the Middle East that the plurality credited in *Hamdi*. 542 U.S. at 531-32 (noting concerns with evidentiary proceedings operating amidst "the rubble of war"). Ultimately, Respondents offer no rationale for resolving virtually any significant dispute, let alone one with stakes as high as this one, based on such rank hearsay. *Cf. Sanchez Puentes*, 2025 WL 1203179 at *13 ("The Court would not accept this evidence even in a case where only nominal damages were at stake, let alone what is at stake here.").

For similar reasons, the Court should permit discovery to allow Petitioner to see the readily-available underlying evidence to which these incriminating declarations refer. See ECF 33 at 19-

[2] Even cursory review of the declarations suggests cross examination could prove illuminating. *See, e.g.*, Cisneros Decl. ¶ 7 (alleging Petitioner suggested he had some involvement with TdA as "a kid" based on a description of a police report describing an interrogation by an El Paso police officer); *id.* ¶ 10 (asserting Petitioner is an "active member" of TdA because "ICE officers and agents well versed in gang activity" have said so, without stating why those individuals reached that conclusion); *id.* ¶ 11 (alleging the police report states that police officers stated that Petitioner's co-defendant (in his dismissed criminal case) claimed that Petitioner "planned to engage in a shootout with police"); *id.* (stating that an assistant district attorney dismissed the case because he assumed "Petitioner had been deported," without offering foundation for that claim); Anchondo Decl. ¶ 11 (describing as "Evidence of Tren de Aragua Membership" that other ICE personnel "notified me that … Petitioner requested to be placed in the holding cell that TdA members and Venezuelans are housed [in]," without distinguishing between TdA members and other Venezuelans); *id.* at ¶ 12 ("it is believed by PDI and other law enforcement agencies" that Petitioner's tattoo is "commonly used" to signify TdA membership, without specifying the foundation for that claim).

20 (citing *Harris v. Nelson*, 394 U.S. 286, 298 (1969), and *Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996)). Respondents cite *Harris* for the proposition that the "liberal discovery standards" of the Federal Rules of Civil Procedure (FRCP) do not apply to habeas proceedings. ECF 35 at 8. But Petitioner does not ask for all the discovery available under those rules or otherwise contend that the FRCP apply by default to these proceedings (unlike, in contrast, the Federal Rules of Evidence, which do apply by default). Instead, Petitioner contends that, under *Harris*, this is "an appropriate case" where limited discovery "will allow for development, for purpose of the hearing, of the facts relevant to the disposition of the habeas corpus petition." 394 U.S. at 298. As Petitioner's actual discovery requests reveal, the requests are modest and targeted simply at ascertaining the basis of the allegations against him. His requests are fully consistent with the Fifth Circuit's instruction that, "[w]hen there is a factual dispute [that] if resolved in the petitioner's favor, would entitle [him] to relief," that petitioner "is entitled to discovery and an evidentiary hearing." *Perillo*, 79 F.3d at 444. Here, there clearly is such a dispute, and limited discovery would allow this Court to resolve it.

B. Longstanding Authority Requires That Respondents Bear the Burden of Proof by Clear, Unequivocal, and Convincing Evidence

Respondents' position on the burden of proof contravenes the Supreme Court's due process analysis in *JGG* and the mountain of authority consistent with the Court's approach that Petitioner cited. *See Trump v. JGG*, 145 S.Ct. 1003, 1006 (2025) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)); ECF 33 at 10-14 (citing, inter alia, *Woodby v. INS*, 385 U.S. 276 (1996), and *Addington v. Texas*, 441 U.S. 418 (1979)). *See also Sanchez Puentes*, 2025 WL 1203179, at *9 (adopting *Woodby* standard).

Respondents stake their entire position to the contrary on a plurality opinion in *Hamdi* that "did not garner a majority of the Court." *Boumediene v. Bush*, 553 U.S. 723, 784 (2008).[3] That alone warrants rejecting it in favor of the line of authority the Supreme Court referenced just weeks ago in *JGG*. *See* 145 S.Ct. at 1006 (citing *Reno*, 507 U.S. at 306). Moreover, Respondents ignore that *Hamdi* concerns the *military's* detention of enemy combatants caught on a battlefield, whereas the Alien Enemies Act— even when properly invoked during wartime—is only a *civilian* authority. *Ex parte Gilroy*, 257 F. 110, 112 (S.D.N.Y. 1919) ("The statute relates to the civil power of the executive. It has no relation to the military arm, except in so far as the exercise of the civil power adjectively aids the military arm"); *see also* Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 Lewis & Clark L. Rev. 963, 979 (2007) (noting that authority under the Alien Enemies Act is "directed toward civilians—nationals of enemy countries, to be sure, but non-combatants under any definition of belligerency").[4]

Respondents' evidentiary submission illustrates why *Hamdi*'s rationale has no applicability here. The plurality there feared that, were the Court to impose heightened procedures, "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for

[3] Respondents argue the *Hamdi* plurality is controlling under the *Marks* rule, ECF 35 at 18 n.2, but they misunderstand that rule. If *Hamdi*'s plurality were controlling, then it would have bound the majority in *Boumediene*. In fact, "*Marks* has nothing to do with this case" because *Hamdi* "yielded no controlling opinion at all." *Ramos v. Louisiana*, 590 U.S. 83, 103 (2020). The *Hamdi* plurality opinion governed further proceedings *in that case*, but Justices Souter and Ginsburg concurred in the result only to ensure a result closest to the one they advocated. *See Hamdi*, 542 U.S. at 553 (Souter, J., concurring) (citing *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in the result)).

[4] *Burns v. Wilson*, is inapposite for the same reason, as it involves a "military habeas corpus" action after trial by an Air Force courts martial. *See* 346 U.S. 137, 139 (1953).

evidence buried under the rubble of war." *Hamdi*, 542 U.S. at 531-32. Here Respondents' evidence comes from El Paso Police Department officers who are presumably used to regularly proving their cases beyond reasonable doubt and ICE officers not involved in combat operations. Similarly, obtaining the body cam footage and other video or materials on which the police and ICE officers have relied would not involve any of the complexity associated with trying to reconstruct the events of a battle in Afghanistan or the disclosure of anything akin to combat plans.

Respondents also place great weight on the fact that *Hamdi* involved a citizen, ECF 35, at 19, but the Due Process Clause applies to all "person[s]," not citizens. Respondents never address the substantial authority already establishing that non-citizens in the United States are entitled to robust due process protections in this context—including the Supreme Court's decision a few weeks ago. Thus, this Court should require Respondents to prove Petitioner's TdA membership by clear, unequivocal, and convincing evidence. *See Sanchez Puentes*, 2025 WL 1203179, at *9.

C. The Court Should Accord No Deference to the Government's TdA Membership Determination

Respondents have now disclaimed any TdA membership determination as to Petitioner—thereby casting doubt even on their own declarations. *See* ECF 35 at 6. Yet they simultaneously argue they are entitled to "some deference" on their determination of whether Petitioner is a member of TdA—a question it seems they have not even answered for themselves. *See id.* at 22.[5]

[5] Respondents' inconsistent position on Mr. Zacarias Matos' designation under the AEA underscores the lack of rigorous fact finding that led to Petitioner's designation in the first place—fact finding that has already proven to be plagued with error. *See* ECF 33, at 13 n. 11 (collecting extensive reporting on the mistakes the government has made so far in its deportations to CECOT under the AEA). It would therefore be logical, in addition to consistent with legal authority, for this Court to grant no deference to Respondents' determination on TdA membership.

Their ambivalence only confirms that this Court should not afford them deference. Unlike during the prior invocations of the Alien Enemies Act, *see* ECF 33 at 15-16, here the government has provided *no administrative process whatsoever* to people designated under the Act. There has been no prior neutral decisionmaker who has conducted a hearing to consider this question, or even just asked Mr. Zacarias Matos about his tattoos, investigated his account of them, or taken testimony from his family members. Under these remarkable circumstances, this Court should not accord deference to the government's determination, as "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings." *Boumediene*, 553 U.S. at 781. Consistent with that principle, "[w]here, as here, the Government does not afford individuals any process whatsoever after an initial agency finding and prior to their removal under the TdA Proclamation, the Government is not entitled to any deference during habeas proceedings challenging such designation." *Sanchez Puentes*, 2025 WL 1203179, *8.

Respondents do not seriously dispute the authority described above. Instead, they reference political question doctrine, noting that *JGG* "opin[ed] on limited judicial review under the AEA." ECF 35 at 23, but *JGG* held that courts have authority to review whether someone "is in fact an alien enemy." 145 S.Ct. at 1006; *see also JGG v. Trump*, No, 250766-JEB, 2025 WL 890401, at *12 (D.D.C. Mar. 24, 2025) ("Faced with repeated claims from detained individuals challenging their designation as alien enemies, courts time and again examined the factual basis for the designation and, where necessary, ordered release if the facts did not show that the detainee was an alien enemy.").[6]

[6] The question of what deference, if any, the government may be due on the threshold questions surrounding the invocation of the Act as a whole, rather than on membership determinations, is before this Court in *JAV*. If for some reason the Court does not resolve it there, Petitioner will address those questions if the Court concludes, after the hearing in this case, that he remains subject to the Act—as the Court's bifurcated scheduling in this case contemplates.

D. The Court Should Apply the Federal Rules of Evidence in the Evidentiary Hearing

As the district court for the Western District of Texas recently held, "the Federal Rules of Evidence apply to these proceedings because they are the default rules in civil proceedings, including habeas, absent an explicit directive otherwise." *Sanchez Puentes*, 2025 WL 1203179, at *10. Respondents never even address the plain text of this controlling statute. It supplies the most straightforward rationale for applying the Federal Rules of Evidence (including the hearsay rule) to this case. Those rules "apply to proceedings before United States district courts." Fed. R. Evid. 1101(a), (e), and their accompanying interpretive notes addresses habeas corpus explicitly, confirming that "[t]he rule does not exempt habeas corpus proceedings … [unless] inconsistent with the statute." Note to Subdivision (d)(2). Respondents certainly point to no *inconsistency* with any statute; therefore, this Court should apply the default rules rather than crafting ad hoc ones.

Rather than contesting this default rule, Respondents point again to the (non-binding) plurality opinion in *Hamdi*, which suggested the government could fashion revised rules for determining enemy combatant status. ECF 35 at 27. But the plurality made that statement to explain what rules the government could adopt for *its own administrative hearing process* for making combatant status determinations—analogous to the review process ICE is apparently now undertaking to determine TdA membership. *See Hamdi*, 542 U.S. at 533-43 (noting that "*enemy-combatant proceedings* may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict" and therefore hearsay "may need to be accepted" (emphasis added)). *Boumediene* subsequently held that the existence of that process did not eliminate the need for federal habeas review, 554 U.S. at 771, and the default rule in those federal court proceedings is, again, that the Federal Rules of Evidence apply. Fed. R. Evid. 1101.

Respondents also seek to avoid an evidentiary hearing by asserting that such hearings are "the last resort" under "modern statutory habeas practice." ECF 35 at 24, 26. They make no attempt to reconcile that claim with Petitioner's examples of extensive evidentiary hearings held under prior AEA invocations. *See* ECF 33 at 15-16 (collecting cases). Nor can their view be squared with the practice in Guantánamo habeas cases, where evidentiary hearings have been the norm, even though the individuals seeking habeas relief have already been afforded a hearing available under the Combatant Status Review Tribunal process. *See, e.g.*, *Paracha v. Trump*, 453 F.Supp.3d 168, 172 (D.D.C. 2020) (discussing results of evidentiary hearing). Indeed, with one inapposite exception, every case Respondents cite involves people found subject to confinement based on robust procedures the government made available before the start of the habeas litigation.[7] In most of them, the procedures involved full-blown trial in federal or state criminal proceedings, while in others they involved specialized administrative hearings of one form or another.[8] Respondents cite no case where a habeas court resolved material issues of fact based just on a paper review even

[7] The only case Respondents cite where habeas did not follow prior evidentiary proceedings is *U.S. ex rel. Hack v. Clark*, 159 F.2d 556 (7th Cir. 1947), an AEA case where petitioner *had already conceded* that he was a (German) "alien enemy," and raised only challenges that had already been rejected by then-controlling cases. *Id.* at 553. That case is therefore inapposite, as Petitioner contests his alleged TdA membership and the Supreme Court has instructed courts to provide review of claims like Petitioner's. *JGG*, 145 S. Ct. at 1006 ("[T]oday'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."). Respondents also never dispute that several AEA cases during prior invocations did involve extensive evidentiary hearings in habeas proceedings. *See* ECF 33 at 15-16.

[8] For cases involving prior federal court criminal proceedings on which Respondents rely, *see Walker v. Johnson*, 312 U.S. 275 (1941); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Ex Parte Bollman*, 8 U.S. 75, 108 (1807). For those involving prior state court criminal proceedings, *see Brown v. Allen*, 344 U.S. 443 (1953); *Garlotte v. Fordice*, 515 U.S. 39 (1995); *Williams v. Kaiser*, 323 U.S. 471 (1945); *Schriro v. Landrigan*, 550 U.S. 465 (2007). For cases involving prior specialized administrative proceedings, *see Boumediene*, 553 U.S. at 733 (combatant-status review tribunals); *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (full removal proceedings); *Eagles v. U.S. ex rel. Samuels*, 329 U.S. 304, 310 (1946) (Congressionally-established board to hear claims seeking exemption from selective service).

when there had been no prior administrative proceeding to resolve those factual issues. That omission is no accident: "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings," *Boumediene*, 553 U.S. at 781. Where, as here, there has been *no* process to determine the question of TdA membership, this Court should employ robust evidentiary procedures. Due Process certainly does not permit the imposition of potentially-indefinite detention and deportation based on two declarations as riddled with hearsay as these. *See Sanchez Puentes*, 2025 WL 1203179, at *10 ("[E]ven in civil cases where the stakes are lower, the Government's case cannot possibly be based *solely* on hearsay.").

* * *

For all these reasons, this Court should not resolve any question of fact against Petitioner absent an evidentiary hearing. It could rule in Petitioner's favor on this record, or, alternatively, should require the live testimony of individuals with personal knowledge who can substantiate the allegations against Mr. Zacarias Matos. The testimony of Officer Cisneros and Agent Anchondo cannot satisfy this standard; and their declarations alone come nowhere close. As those statements already make clear, neither of them has any personal knowledge of Petitioner whatsoever. They were not present when he was arrested, do not appear to have ever questioned him, and were not the ones who determined he was a TdA member. *See* ECF 35-1, 35-2. The Constitution does not permit Petitioner's potentially-indefinite detention and banishment based solely on the written declarations of these officers.

IV. The Court Should Preclude the Government from Removing Mr. Zacarias Matos Under Expedited Removal.

Respondents raise an entirely new basis for rejecting Petitioner's habeas petition, based on their sudden maneuvers—all made after this Court issued its TRO—to dismiss the pending removal proceeding against Petitioner, place him in expedited removal proceedings (more than a

year after he first entered the U.S.), then deny his fear-based claims, and reject his appeal. They did all this in the span of less than a month. *See* Exhibit 7, Declaration of Jorge Dominguez ("Dominguez Decl.").

The Court should reject Respondents' latest, desperate attempts to deny Petitioner due process, and place him back into the position he was in when it first received his case—in normal removal proceedings. Contrary to Respondents' claims, no statute authorizes Petitioner's expedited removal; Congress has not stripped this Court of habeas jurisdiction to review that legal claim; and if it had, doing so would violate the Due Process Clause.

A. Under the Plain Text of the Governing Statute, Mr. Zacarias Matos Is Not Subject to Expedited Removal.

Respondents' sudden procedural maneuver is unlawful because the government previously paroled Petitioner into the United States shortly after apprehending him, and the expedited removal statute, by its terms, cannot be applied to people who have been paroled. 8 U.S.C. 1225(b)(1).

While Respondents' account of how Petitioner entered the United States has shifted, there is no ambiguity about the fact that he was apprehended and then released pending a final determination of his admissibility. *See* ECF 10 at 3 (December 9, 2023 I-213 stating that Petitioner was "processed as a Notice to Appear and released on recognizance"); *id.* at 12 (Order of Release on Recognizance).[9] That the government released Petitioner after initially apprehending him is crucial, because the only authority to release someone in that posture is through parole. As the

[9] The government's brief states that Petitioner "applied for admission" at the port of entry in El Paso, ECF 25, at 4 (citing Cisneros Decl. ¶ 5), but the previously-submitted I-213 states that Petitioner entered the United States and was then apprehended. The latter version is consistent with what the Cisneros declaration actually says on this point. *See* ECF 35-1, Cisneros Decl. at ¶ 5 ("Petitioner entered the United States, with his minor daughter, without being admitted or paroled . . . Petitioner was served with a Notice to Appear (NTA) on December 9, 2023, and he was released on his own recognizance").

Supreme Court has explained, "[r]egardless of which of [two potentially different sources of authority] authorizes their detention, applicants for admission may be temporarily released on parole 'for urgent humanitarian reasons or significant public benefit,'" and "[t]hat express exception to detention implies that there are no *other* circumstances under which [noncitizens] detained under § 1225(b) may be released." *Jennings v. Rodriguez*, 583 U.S. 281, 288, 300 (2018) (citing 8 U.S.C. 1182(d)(5)(A)) (emphasis in original). Because Mr. Zacarias Matos was placed in custody shortly after entering the United States and then released pending removal proceedings, he was necessarily paroled. *Id.*

Because Petitioner was paroled, he could not later be subject to expedited removal. The statute provides the government with expedited removal authority only for two groups of people: certain arriving non-citizens, and "certain other [noncitizens] who have not been admitted or paroled." 8 U.S.C. 1225(b)(1), (b)(1)(A)(iii)(II). Petitioner does not fit into either category. He cannot be classified as "arriving," because he did not present himself at a port of entry. *See* 8 C.F.R. 1.2 ("Arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry"). And he is not a noncitizen "who ha[s] not been admitted or paroled," because he has been paroled.

As the plain text makes clear, while Respondents have broad authority to initiate expedited removal proceedings against qualifying non-citizens, they have no authority to use expedited removal against individuals who do *not* qualify, including those released on parole. Another court recently reached the same conclusion, in the context of the Biden-era humanitarian parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans. *Doe v. Noem*, No. 1:25-cv-10495-IT, 2025 WL 1099602, *16- (D. Mass. Apr. 14, 2025) (noting that paroled individuals "are not subject to expedited removal even if they have been here less than two years"). As *Doe* explained,

the government has no authority to subject individuals to expedited removal after it has paroled them. Once the government "authorized [Petitioner] to enter the United States" through parole, it lost the authority to subject him to expedited removal. *Id.*

B. This Court Has Jurisdiction to Determine the Legality of Mr. Zacarias Matos's Expedited Removal Proceedings.

Respondents make no attempt to explain how they could subject Petitioner to expedited removal despite having previously paroled him and placed him in full removal proceedings for nearly 18 months. Nor do they attempt to defend the highly irregular procedural mechanisms by which they obtained the expedited removal order against him. *See* Exh. 2, Dominguez Decl. Instead, they contend this Court lacks authority to review the legality of their actions, citing the jurisdiction-stripping provisions of 8 U.S.C. 1252(e) and (g). ECF 35, at 11, 14. But neither of those provisions strips jurisdiction over the purely statutory claim at issue here: that Petitioner is not lawfully subject to expedited removal to begin with. If they did, even people lawfully admitted as students, tourists, or business visitors—people clearly "admitted or paroled"—could be swept into expedited removal proceedings with no avenue to challenge their unlawful removal, even though the statute plainly bars such conduct. The text of the jurisdiction-stripping provisions on which Respondents rely does not afford them expansive authority to act in violation of the statute, and interpreting it that way would violate Petitioner's Due Process and Suspension Clause rights.

Instead, when properly construed, the jurisdictional statutes on which Respondents rely to shield their highly unusual maneuver from judicial review—8 U.S.C. 1252(e) and (g)—do not apply to Petitioner's claims. Because 8 U.S.C. 1252(e) and (g) do not bar review over Petitioner's claims, the general habeas statute continues to govern. *See* 28 U.S.C. 2241. That provision authorizes review over claims by federal prisoners and over claims involving questions of law, both of which require this Court to exercise jurisdiction over Petitioner's claim that the statute

does not authorize his expedited removal. *See St. Cyr*, 533 U.S. at 298 (citing 28 U.S.C. 2241(c)(1) and (3) as authorizing review for legal claim by non-citizen already in the United States); *see also Hamdan v. Rumsfeld,* 548 U.S. 557, 575 (2006) ("Congress would not be presumed to have effected [a] denial [of habeas relief availability] absent an unmistakably clear statement to the contrary.").

a. Section 1252(e) does not bar review of Petitioner's claim that the statute does not authorize his expedited removal; and if it did it would be unconstitutional.

Respondents are correct that Section 1252(e)(2) drastically limits habeas review of expedited removal orders *where it applies*. However, by its plain terms it only limits habeas review of "any determination made *under Section 1225(b)(1)*." 8 U.S.C. 1252(e)(2) (emphasis added). Respondents implicitly acknowledge this limitation, stating that the jurisdiction-stripping provision applies only to "individuals … who are subject to removal under Section 1225(b)(1)." ECF 35 at 11. However, as explained above, Section 1225(b)(1) does not authorize the expedited removal of individuals who, like Petitioner, "have [] been paroled."

The Court should reject Respondents' far broader reading of the jurisdictional provision at 1252(e), under which they could entirely ignore the limits on their expedited removal authority, leaving immigrants without any judicial remedy. *See generally DHS v. Thuraissigiam*, 591 U.S. 103, 137 (2020) (acknowledging "a quartet of interpretive canons: 'the strong presumption in favor of judicial review of administrative action,' 'the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,' the rule that a 'clear indication' of congressional intent is expected when a proposed interpretation would push 'the outer limits of Congress' power,' and the canon of constitutional avoidance," all of which counsel against broadly construing stripping provisions in this context) (citing *St. Cyr*, 533 U.S. at 298-300). While *Thuraissigiam* found those canons insufficient given the clear language barring review of claims

by asylum seekers who had *not* been paroled, it does not support Respondents' view that the statute bars review of claims by a far larger group of individuals. Indeed, if ICE officers can subject individuals who have been paroled to expedited removal even though the statute does not permit it, they can subject to expedited removal individuals admitted on valid visas—including business people, students, and tourists, among many others—and the targeted immigrants would have no recourse.[10]

Respondents' expansive reading of the statute would also be unconstitutional as applied to Petitioner, under both the Due Process Clause and the Suspension Clause. *First*, as *Thuraissigiam* explained, Petitioner is at the bare minimum entitled to assert the rights Congress gave him by statute. 591 U.S. at 131 ("the decisions of executive or administrative officers, *acting within powers expressly conferred by Congress*, are due process of law" (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892))). However, as explained above, Congress did not give immigration officers the power to subject Petitioner to expedited removal, because he was paroled. Under *Thuraissigiam*, even a noncitizen who has no established presence in the United States "has only those rights regarding admission that Congress has provided by statute." 591 U.S. at 140. Mr. Thuraissigiam was afforded those rights—the Court construed his petition to argue only that he "should have passed the credible fear stage," *id.* at 114—and he did not contest that he was lawfully

[10] Respondents suggest that Petitioner (and presumably others like him) could also challenge their expedited removal in federal court in Washington, D.C. under the statute's channeling provisions, ECF 35 at 12 (citing 8 U.S.C. 1252(e)(3)(A), but the statute authorizes such actions for "challenges on [the] validity of the system," not individual claims that officers are acting beyond the authority specified in the statute in individual cases. This limitation is clear from the statute's deadline provision, which requires that any such actions be filed within 60 days "after the date the challenged section, regulation, directive, guideline, or procedure . . . is first implemented." 8 U.S.C. 1252(e)(3)(B). Mr. Zacarias Matos does not challenge a "regulation, directive, guideline, or procedure," he just challenges the government's statutory authority to place *him* into expedited removal proceedings when he is plainly not subject to them under the plain text of the statute.

subject to that process to begin with. *See id.* In contrast, Petitioner here simply is not subject to expedited removal. Any reading of the statute that bars him from asserting that claim would violate the Due Process Clause as *Thuraissigiam* interpreted it.

Second, although the Court need not reach it to rule in Petitioner's favor, he is entitled to more due process protection than was Mr. Thuraissigiam because Mr. Thuraissigiam was subject to expedited removal within hours of his entry and therefore was treated as akin to someone stopped at the border. 591 U.S. at 104-05 ("this rule [limiting the due process rights of people stopped at the border] would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil"). While that rule likely would have applied to Petitioner if, like Mr. Thuraissigiam, Respondents had continued to detain him after they first apprehended him, it does not apply *now*, given that the government voluntarily released him and allowed him to live freely in this country for 18 months before then reversing course and subjecting him to expedited removal a few weeks ago. For that reason, he must be treated like any other "person," and therefore entitled to more robust protection under the Due Process Clause—protection which, at minimum, requires a court to remedy clear violations of his statutory rights. ECF 33 at 9 (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)).[11]

[11] *Thurasissigiam* also does not apply where, as here, an immigrant seeks *mandatory* relief under withholding of removal and the Convention Against Torture (CAT), rather than only discretionary relief under asylum. *See* 591 U.S. at 110 n. 5 (noting that the petition raises challenge only as to denial of asylum, which is discretionary, rather than withholding of removal and protection under CAT, both of which are mandatory); *see also Sergio S.E. v. Rodriguez*, No. 20-6751-JMV, 2020 WL 5494682, at *7 (D.N.J. Sept. 11, 2020) (rejecting the applicability of *Thuraissigiam* to T visa because "it does not appear that USCIS has discretion to deny an appropriate application" and therefore petitioner "demonstrated that he is likely to establish a constitutionally protected interest in applying for a T visa"); *Al Otro Lado, Inc. v. Mayorkas,* No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, *20 (S.D. Cal. 2021) ("Because Defendants' turning back of asylum seekers unlawfully withholds their duties under statute, it violates the process due to class members.").

Third, Respondents' reading would also violate the Suspension Clause, albeit for somewhat different reasons. As *Thuraissigiam* recognized, the Supreme Court has long held that "[b]ecause of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'"591 U.S. at 137. *Thuraissigiam* read that rule as limited to noncitizens "already in the country who were held in custody pending deportation," *id.*, and therefore inapplicable to people like Mr. Thuraissigiam, who had never effected an entry. However, as explained above, Mr. Zacarias Matos did enter, and was subsequently released on parole and allowed to live here for an extended period. Therefore, his claims fall within the "core" of the writ of habeas corpus, and he is entitled to habeas review to challenge the legality of his expedited removal. *JGG*, 145 S.Ct. at 1005 ("Regardless of whether the detainees formally request release from confinement, because their claims for relief 'necessarily imply the invalidity' of their confinement and removal . . . their claims fall within the 'core' of the writ of habeas corpus and thus must be brought in habeas."). Denying him that opportunity would violate the Suspension Clause. *Boumediene*, 553 U.S. at 745.

b. Section 1252(g) also does not strip this court of jurisdiction over Petitioner's claims that he is not lawfully subject to expedited removal.

Respondents also contend that Section 1252(g) separately strips this Court of authority to stay Petitioner's removal, and therefore bars Petitioner's challenge, but this argument is foreclosed by two different Supreme Court cases and contrary to the consistent practice of federal courts throughout the Nation.

First, Respondents ignore the Supreme Court's holding in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), which construed Section 1252(g) to bar challenges "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at 482

(emphasis in original). As the Court explained, "[t]here are of course many other decisions or actions that may be part of the deportation process" to which the bar at Section 1252(g) does not apply. *Id.* The Court also "did not interpret this language to sweep in any claim that can technically be said to 'arise from' the three listed actions." *Jennings v. Rodriguez*, 583 U.S. 281, , 294 (2018) (plurality) (citing *AADC*, 525 U.S. at 471). Instead, Section 1252(g) applies only to those "three types of *discretionary* decisions by the Attorney General." *St. Cyr*, 533 U.S. at 311, n. 34 (emphasis added). Because Section 1252(g) covers only challenges to the exercise of *discretion*—i.e., "the decision or action"—to commence proceedings, adjudicate cases, or execute removal orders, it does not bar *legal* challenges to removal orders like the one Petitioner asserts here, because Respondents have no discretion to violate the law. *Cf. Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531, 534 (1988) (finding FTCA case not barred by discretionary function exception because "regulatory agencies have no discretion to violate the command of federal statutes or regulations").

In keeping with the Supreme Court's narrow reading of Section 1252(g) in these cases, courts have consistently rejected application of Section 1252(g) to statutory and constitutional claims like Petitioner's here. *See DHS v. Regents of the University of Calif.*, 591 U.S. 1, 19 (2020) (rejecting the government's argument that termination of DACA was unreviewable under Section 1252(g)); *Texas v. U.S.*, 809 F.3d 134, 164 (5th Cir. 2015) (rejecting the government's argument that Section 1252(g) made DAPA unreviewable). Challenges to the government's *legal authority* are therefore not within the reach of 1252(g). *See Kong v. United States*, 62 F.4th 608, 613 (1st Cir. 2023) ("[A]dministrative actions do not 'arise from" the government's decision to 'execute removal orders'. . . simply because the claims relate to that discretionary, prosecutorial decision in the 'but for' causal sense. Our task . . . is to determine whether Kong's claims implicate ICE's *discretionary* decision to pursue his removal in the sense relevant to § 1252(g)" (emphasis added));

Bello-Reyes v. Gaynor, 985 F.3d 696, 700, n.4 (9th Cir. 2021) (finding Section 1252(g) did not bar First Amendment habeas challenge to petitioner's re-detention by ICE); *Calderon v. Sessions*, 330 F. Supp. 3d 944, 955 (S.D.N.Y. 2018) ("The review of the ICE's legal authority simply does not entail review of ICE's discretionary decision."). 1252(g) therefore does not strip jurisdiction over Petitioner's claims here.

Second, Respondents' position ignores the Supreme Court's holding that federal courts retain authority to issue stays of removal notwithstanding 8 U.S.C. 1252(f)(2). *Nken v. Holder*, 556 U.S. 418, 436 (2009). The *Nken* majority did not address 1252(g) directly (though the dissent did), but its holding would have made no sense if Respondents' broad view of Section 1252(g) were correct, because stays of removal issued by federal courts would necessarily involve claims "arising out of" removal proceedings on their extremely broad reading of that phrase. *See* ECF 35 at 14 (incorrectly characterizing the scope of 1252(g) as barring any claim "arising from the execution of removal orders").

Third, Respondents' position contravenes the practice of federal courts throughout the country, including the Fifth Circuit, which consistently grant stays of removal and regularly reverse removal orders. On Respondents' view, all such orders would violate Section 1252(g).

Unsurprisingly, none of the Fifth Circuit cases on which Respondents rely support their novel and expansive reading of Section 1252(g). The two 20-year-old unpublished decisions they cite do not analyze the scope of 1252(g)'s applicability, and both also predate *Nken*. *See Idokogi v. Ashcroft*, 55 F. App'x 526 (5th Cir. 2003) (per curiam); *Fabuluje v. Immigr.& Naturalization Agency*, 244 F.3d 133, 2000 WL 1901410, at *1 (5th Cir. 2000). The *Bivens* case they cite is even further afield; it does not address the applicability of Section 1252(g) to habeas proceedings at all. *Foster v. Townsley*, 243 F.3d 210, 211 (5th Cir. 2001).

Finally, the Court should construe Section 1252(g) narrowly because adopting Respondents' proposed interpretation would violate Petitioner's due process and Suspension Clause rights, for the same reasons discussed above as to Section 1252(e). Respondents seek to work a truly drastic deprivation of Petitioner's liberty. The Constitution entitles him to judicial review of their actions.

* * *

For all these reasons, this Court retains authority to restore Petitioner to the position he occupied before the Government labeled him an "alien enemy." That includes the power to find that Petitioner cannot be subject to expedited removal, and must instead be permitted to proceed in normal removal proceedings under Section 1229a. *See* ECF 1 at 8 ("Petitioner is in Section 1229a removal proceedings.... No other proceedings specified in the immigration laws for determining removability apply to Petitioner."). That approach would be consistent with both how the government chose to treat Petitioner before its misguided attempt to invoke the AEA against him and with his own Due Process and Suspension Clause rights under the Constitution.

CONCLUSION

For the foregoing reasons, the Court should: a) hold that Petitioner cannot be sent to CECOT unless charged and convicted of a crime for which such punishment is the duly authorized sentence; b) either rule now that the government has failed to meet its burden, or move forward with the evidentiary hearing it previously ordered under the standards and procedures Petitioner has advocated; and c) prohibit Respondents from subjecting Petitioner to expedited removal, and instead specify that, if they choose to proceed in their attempts to deport him, they must do so under the "sole and exclusive" procedures set forth in 8 U.S.C. 1229a.

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Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that on April 28, 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/ *Jaime Diez*
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