

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

Y.A.P.A.,

Petitioner–Plaintiff,

v.

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

Respondents–Defendants.

Case No. 4:25-cv-144-CDL-CHW

**PETITIONER–PLAINTIFF’S
OPPOSITION TO
RESPONDENTS’ MOTION
FOR LEAVE TO FILE UNDER
SEAL**

**PETITIONER–PLAINTIFF’S OPPOSITION TO RESPONDENTS’ MOTION FOR
LEAVE TO FILE UNDER SEAL**

Petitioner–Plaintiff (“Petitioner”) opposes Respondents’ motion to file the Declaration of Matthew L. Elliston, U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Deputy Assistant Director, and its accompanying exhibit under seal. ECF Nos. 16, 20. Because the supposedly sensitive information in the declaration is substantively identical to what is already in the public record through declarations filed on the public docket in this and other court proceedings around the country—including by Respondents themselves, not under seal—the motion should be denied. Indeed, when the government originally sought to file this substantively identical information in a declaration under seal in the Southern District of Texas, Judge Rodriguez quickly unsealed it, concluding that the declaration contains nothing that would remotely disclose sensitive operational details, and that there is no legitimate basis to support sealing—let alone a justification that would overcome the public’s presumptive right of access to court records. *See*

Oral Order, *J.A.V. v. Trump*, No. 1:25-cv-72 (S.D. Tex. Apr. 24, 2025, 4:26 CT); Tr. 8:15–9:15, *J.A.V. v. Trump*, No. 1:25-cv-72 (S.D. Tex. Apr. 24, 2025) (attached as Exh. 1).¹

In the declaration and exhibit, the government describes the notice procedures that it claims to be providing individuals who are designated for removal under the Alien Enemies Act (“AEA”). The Elliston Declaration includes critical information such as what detainees must do and on what timeline in order to request judicial review before they are summarily removed. This declaration therefore contains information relevant to any individual who might be subject to the AEA, any immigration counsel seeking to assist such a client, and the public more broadly. The Elliston Declaration asserts, without support, that the notice process “is law enforcement sensitive.” That is insufficient to justify sealing the Declaration, especially in this context. Respondents’ motion should be denied.

ARGUMENT

I. LEGAL STANDARD

As the Supreme Court and Eleventh Circuit have made clear, there is a “presumptive common law right to inspect and copy judicial records.” *United States v. Rosenthal*, 763 F.2d 1291, 1293 (11th Cir. 1985); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“[T]he courts of this country recognize a general right to inspect and copy . . . judicial records and documents.”). This common law right “is instrumental in securing the integrity of the [judicial] process.” *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001) (per curiam); see *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (per curiam) (“The district court must keep in mind the rights of a third party—the public, ‘if the public is to appreciate fully the

¹ All information discussed in this opposition is already available to the public, including in filings by the government. See, e.g., ECF No. 17 at 4 (discussing notice procedures described in Elliston Declaration).

often significant events at issue in public litigation and the workings of the legal system.”) (citation omitted). Court records are “presumptively available to the public under the common law so that the judicial process can remain accessible and accountable to the citizens it serves.” *Callahan v. United Network for Organ Sharing*, 17 F.4th 1356, 1363 (11th Cir. 2021). Similarly, the First Amendment provides a presumptive right of public access to court proceedings and records. *See, e.g., Chicago Tribune*, 263 F.3d at 1310 (“this court has extended the scope of the constitutional right of access to include civil actions pertaining to the release or incarceration of prisoners and their confinement”) (citation omitted).

Relevant factors to consider include, but are not limited to, “(1) whether allowing access would impair court functions or harm legitimate privacy interests, (2) the degree of and likelihood of injury if made public, (3) the reliability of the information, (4) whether there will be an opportunity to respond to the information, (5) whether the information concerns public officials or public concerns, (6) the availability of a less onerous alternative sealing the documents, (7) whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, (8) whether access is likely to promote public understanding of historically significant events, and (9) whether the press has already been permitted substantial access to the contents of the records.” *Gubarev v. BuzzFeed, Inc.*, 365 F. Supp. 3d 1250, 1256 (S.D. Fla. 2019) (quoting *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007)).

II. RESPONDENT’S MOTION TO SEAL SHOULD BE DENIED

Here, Respondents’ attempt to seal the Elliston Declaration fails for the simple reason that the same supposedly sensitive information—including the exact same form attached as an exhibit to the declaration—has already been disclosed in other, high-profile AEA litigation around the

country, including *this* one. Compare Elliston Decl.,² with ECF No. 4-4 (Cisneros Decl.); ECF No. 4-3 (Form AEA-21B); and Cisneros Decl., *J.G.G. v. Trump*, No. 1:25-cv-766 (D.D.C. May 1, 2025), ECF No. 108-2 (attached as Exh. 2); see also Cisneros Decl., *J.A.V. v. Trump*, No. 1:25-cv-72 (S.D. Tex. Apr. 24, 2025), ECF No. 49; Cisneros Decl., *A.S.R. v. Trump*, No. 3:25-cv-113 (W.D. Pa. Apr. 24, 2025), ECF No. 40-1; Cisneros Decl., *D.B.U. v. Trump*, No. 25-cv-1163 (D. Colo. Apr. 24, 2025), ECF No. 44-1; Cisneros Decl., *G.F.F. v. Trump*, No. 1:25-cv-2886 (S.D.N.Y. Apr. 24, 2025), ECF No. 80; Cisneros Decl., *W.M.M. v. Trump*, No. 1:25-cv-59 (N.D. Tex. Apr. 29, 2025), ECF No. 55-1; Cisneros Decl., *M.A.P.S. v. Garite*, No. 3:25-cv-171 (W.D. Tex. May 10, 2025), ECF No. 3-2.

Indeed, as noted, Judge Rodriguez rejected the government’s attempt to seal a declaration containing substantively identical information, overruling a similarly conclusory claim that the government’s timeline and basic procedures for providing notice of AEA designation and removal were law enforcement sensitive. See Exh. 1 (*J.A.V. Tr.*) 8:15–9:15; see also *id.* Oral Order (S.D. Tex. Apr. 24, 2025, 4:26 CT) (granting opposed motion to unseal Cisneros declaration). Specifically, Judge Rodriguez stated that “the disclosure of form . . . AEA-21B and the declaration of Mr. Cisneros would not reveal confidential investigative methods, thought processes or jeopardize an ongoing or future investigation and would not pose a risk of harm to any individual.” Exh. 1 (*J.A.V. Tr.*) 8:15–8:21.

None of the minor changes to the Elliston Declaration alter that conclusion: the details that the government claims could “endanger law-enforcement personnel and thwart lawful removals”—i.e., when “removals would be scheduled to occur based on when [detainees] receive

² The Elliston Declaration bears the caption for a different case—*J.G.G. v. Trump*, No. 1:25-cv-00766-JEB (D.D.C.)—and is dated May 9, 2025.

the notice,” ECF No. 16 at 2—are all already in the public record. *See supra*. Notably, in granting the petitioners’ motion to unseal the Cisneros declaration, Judge Rodriguez stated:

In particular, [the government] noted that the sensitive information concerned the number of hours that individuals who were designated as enemy aliens would have to notify the government that the person intended to file a petition for habeas relief and the number of hours that the person would have to actually file the habeas action before the government would move forward with removal.

That’s obviously not part of any investigation because the person’s already in custody and has been detained, will not affect any rights or . . . any ongoing investigation as to that individual , and it’s hard to determine how that would affect investigation as to other individuals for the public to know how much notice the government is providing to designated enemy aliens.

Exh. 1 (*J.A.V. Tr.*) 8:22–9:12. Importantly, several courts have already discussed the government’s procedures and timeline for providing notice and time to contest removal (and held they violated due process). *See G.F.F. v. Trump*, --- F. Supp. 3d ----, No. 25 CIV. 2886 (AKH), 2025 WL 1301052, at *6 (S.D.N.Y. May 6, 2025); *A.S.R. v. Trump*, No. 3:25-CV-00113, --- F. Supp. 3d ----, 2025 WL 1378784, at *7, *19–20 (W.D. Pa. May 13, 2025). The government has discussed this timeline in its own publicly filed opposition to Petitioner’s motion for a temporary restraining order, citing to the Elliston declaration without redaction. *See* ECF No. 17 at 4. Because this information has been public for three weeks, the government cannot credibly claim that disclosure of that information would somehow *now* jeopardize public safety (even assuming it ever could).³

³ The new information in the declaration does not involve the timeline for AEA notices and removals. Specifically, the new information falls into four categories, none of which is confidential: (1) comparing the AEA process to an existing immigration process (discussed in Respondents’ brief, ECF No. 17 at 13–14), *see* Elliston Decl. ¶ 16, (2) reflecting the declarant’s personal impressions about the process, *id.* ¶¶ 11, 17, (3) describing how ICE serves the notice on a noncitizen, *id.* ¶ 12, which is described in Respondents’ brief, ECF No. 17 at 4, and (4) referencing a couple habeas petitions that have been filed and are in the public domain, Elliston Decl. ¶¶ 19–21. Respondents also do not base their security concerns on any of this information or explain how it could be law enforcement sensitive.

More generally, multiple factors weigh heavily in favor of the public’s access to the Elliston Declaration. *See Callahan*, 17 F.4th. at 1363 (describing “important questions” a court will consider in evaluating whether presumption of public access has been overcome). First, the content of the declaration involves “public officials or public concerns,” *id.*, namely, the government’s policy and practice in exercising an unprecedented wartime power outside the context of war and against an entity that is not a foreign government or nation. Relatedly, access is likely to promote public understanding of historically significant events and the press has already been permitted substantial access to the contents of the declaration.⁴ The summary removals of Venezuelan detainees pursuant to the President’s Proclamation and invocation of the AEA is a matter of great public concern, and this weighs heavily in favor of disclosure. *See, e.g., Robinson v. City of Huntsville*, No. 5:21-CV-00704-AKK, 2021 WL 5053276, at *4 (N.D. Ala. Nov. 1, 2021) (unsealing police bodycam footage over city’s objections to “allow the public to gain a better understanding of the [law enforcement] officer’s conduct” and “because the press has already been permitted substantial access to the contents of the records”).

Second, the information provided in the declaration is directly relevant to any Venezuelan noncitizen over the age of 14 in the United States who could be subjected to the Proclamation, as well as attorneys who may represent them. While the government claims to be providing sufficient notice and a reasonable opportunity to seek judicial review, it has filed under seal information directly relevant to how and when any individual is expected to pursue that judicial review. This information is not only of a public nature and of legitimate public concern, it would *hurt* litigants’

⁴ *See, e.g.,* The Associated Press, *Venezuelans subject to removal under wartime act have 12 hours to contest*, NPR (Apr. 25, 2025), <https://perma.cc/6GND-ZH78>; Laura Romero, *DOJ giving migrants 'no less than 12 hours' to indicate they intend to contest AEA removal*, ABC News (Apr. 24, 2025), <https://perma.cc/2XEH-UM6J>.

and the public's confidence to allow the government to conceal its contents, especially when it goes directly to matters being litigated in multiple courts, including at the Supreme Court. *See Perez-Guerrero v. U.S. Atty. Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013) (per curiam) (“As Judge Easterbrook has explained, ‘Judges deliberate in private but issue public decisions after public arguments based on public records . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.’” (quoting *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006))); *Robinson*, 2021 WL 5053276, at *3 (“transparency is crucial to maintain trust in our [legal] system and in our democratic society as a whole”).

Finally, Respondents’ proffered justifications for sealing are speculative and unsupported. They claim that disclosure of the Elliston Declaration and its supporting exhibit—the contents of which are, as discussed above, already available to the public—would lead to “coordinated resistance to removals,” including “physical attacks on law-enforcement and removal-operations personnel.” ECF No. 16 at 2. Respondents cite nothing to support such broad assertions. *See Mad Room, LLC v. City of Miami*, No. 21-CV-23485, 2023 WL 4571157, at *8 (S.D. Fla. July 18, 2023) (“‘[g]eneralized concerns, conclusory statements, or unsupported contentions are insufficient reasons for entry of a protective order.’ . . . The [movant]’s arguments are also rife with speculation[.]” (internal citations omitted)). Moreover, the government *itself* has already disclosed the very information that it claims would thwart removals. *See* Exh. 2 (Cisneros Decl., submitted in *J.G.G.*). Thus, the government cannot remotely meet its heavy burden, through a single conclusory sentence, that the declaration is “law enforcement sensitive” because the document does not implicate a “compelling interest in the protection of a continuing law enforcement investigation.” *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993); *see also Robinson*,

2021 WL 5053276, at *2-3 (unsealing records over objection that release “could compromise the safety of the defendant officers,” in part because “the public already has considerable access to the contents” and there were no ongoing investigations at the time); *United States v. Sledge*, No. 16-0031-WS, 2016 WL 3024149, at *1 n.2 (S.D. Ala. May 25, 2016) (“The Government’s Motion does not articulate any justification for the requested sealing order, and the Court’s independent review of the recording reveals no sensitive contents, privacy concerns or *bona fide* law-enforcement interest in secrecy that might overcome the presumption of public access.” (emphasis in original)).

Because of the factors weighing in favor of disclosure, the absence of any plausible justification for keeping the declaration and exhibit under seal, and most importantly, that the information is already public, sealing is improper.

CONCLUSION

Respondent’s motion to seal the Elliston Declaration and its accompanying exhibit should be denied.

Dated: May 16, 2025

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Respectfully submitted,

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

J.A.V. et al)
)
)
VS.) CIVIL ACTION NO.
) 1:25-CV-72
)
Trump et al)

INJUNCTION HEARING
BEFORE THE HONORABLE FERNANDO RODRIGUEZ, JR.
APRIL 24, 2025

A P P E A R A N C E S

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1 THE COURT: You can be seated.

2 Good afternoon. We are here in the matter of J.A.V.
3 et al. versus Donald J. Trump et al., 25-CV-72.

4 If lead counsel want to go ahead and make
5 their appearances. And then if others at the table make
6 argument, they can then present themselves at that time.

7 MR. GELERNT: Good afternoon, Your Honor,
8 Lee Gelernt for the plaintiffs from the ACLU.

9 THE COURT: Okay.

10 MR. HU: Daniel Hu for the United States,
11 but Mr. Velchik will argue for the government today.

12 THE COURT: Thank you. You're welcome to
13 remain at -- at counsel's table, especially if -- if
14 more than one individual may respond to some of the
15 questions that -- that I have. Just when you do, please
16 make sure that one of the microphones is pointing toward
17 you so that it picks up your voice well and the record
18 is -- is clearer.

19 We have four pending motions that I did want
20 to address. We have the Motion for a Preliminary
21 Injunction, that's document 42; a Motion to Certify
22 Class; document 4; Motion to Unseal Cisneros
23 Declaration, that's document 47; and the Motion to
24 Proceed Under Pseudonym, that's document 5.

25 I want to begin first with the Motion to

1 Unseal Cisneros Declaration. And so question for the
2 respondents here: The -- the -- how does the
3 declaration and the form AEA-21B reveal confidential
4 investigative methods, thought processes or -- sorry, or
5 jeopardize an ongoing or future investigation?

6 MR. VELCHIK: Your Honor, the declaration
7 combined with the form does include references to the
8 movements of -- of vehicles, claims timing, the movement
9 on individuals, its center. So certainly the -- the
10 declaration I think we believe is law enforcement
11 sensitive and we would oppose a -- a motion to unseal
12 that.

13 THE COURT: The -- is it your contention
14 that the disclosure of the -- the declaration and the
15 form would create a risk of harm to any individual?

16 MR. VELCHIK: We believe that risks of harm
17 in general apply in like circumstances, but we would
18 emphasize for the court unique circumstances here which
19 are described in Exhibits A & B to the respondent's
20 motions noting the heightened risks to staff posed
21 by gangs in general but in particular members of TdA.

22 And so we think that whatever law
23 enforcement sensitive concerns generally apply in these
24 circumstances, that they are exacerbated in this
25 particular context.

1 THE COURT: I mean, I'm looking at the
2 declaration, which is under seal, it's document 49,
3 there's perhaps general references to movement of
4 individuals, but nothing particularly specific.

5 And it just describes time periods and the
6 procedures internally that the government would use in
7 its discussions with detainees when providing the notice
8 and explaining it to them in -- in -- in Spanish.

9 I guess I'm -- I have some difficulty
10 understanding what, you know, the -- the declaration
11 itself states that the declaration should be filed and
12 remain under seal because this process is law
13 enforcement sensitive, but -- but it's conclusionary in
14 that sense. I guess just to ask again, I mean, what --
15 what is it about the procedures that reveals any type of
16 investigative method or that would jeopardize an
17 investigation?

18 MR. VELCHIK: The declaration does include
19 quantitative estimates that if they were publicly
20 available would allow others to understand and interpret
21 the movement of law enforcement officials' vehicles.

22 And -- and we think that revealing
23 information to members of a foreign terrorist
24 organization about federal law enforcement movement of
25 vehicles, particularly when it pertains to potentially

1 movements to foreign countries in coordination with
2 other sovereigns, poses risks and we believe that
3 release of this information in combination with other
4 information individuals could glean could be used to
5 create risks that we think justify maintaining this
6 under seal.

7 THE COURT: A response?

8 MR. GELERT: Your Honor, I want to choose
9 my words carefully but I -- I would say there is zero
10 merit to this sealing. To begin with, the forms are
11 supposed to be, by the government's own admission, given
12 to the detainee. Obviously, the detainee can give it
13 outside of the detention center. So, right there, I --
14 I think that would have to defeat it.

15 But, more fundamentally, the declaration
16 goes to how much notice they're going to give people.
17 That is what's central to this court's determination on
18 the merits, it's what the Supreme Court is looking at.

19 They have told the Supreme Court and other
20 courts the amount of notice that they think they're
21 going to give, now they're saying in this declaration
22 that they're saying nobody can see. I -- I can find no
23 conceivable basis for saying that they're not going to
24 let the public or the courts know exactly how much time
25 they're planning on giving people.

1 I don't understand remotely how it would
2 tell people the movements of law enforcement, especially
3 because if the form is given to detainees and they can
4 give it out, there's one sentence there, I don't -- the
5 fact that they think that these people are -- these
6 alleged gang members are dangerous has no bearing on not
7 revealing the notice requirements.

8 They have not submitted it to other courts,
9 presumably, or I -- I don't want to say presumably but
10 maybe that's not why they're not making it public. We
11 would think they would have at least put it under seal
12 in other courts that are considering this exact issue.
13 As Your Honor knows, it's pending before the
14 Supreme Court. I -- I -- I'm -- I apologize, I'm sort
15 of at a loss to understand it remotely how this can be
16 something that remains under seal when it goes to the
17 heart of this case, it doesn't go to law enforcement
18 movements.

19 I'm -- I'm happy to answer any questions,
20 Your Honor, but I -- I think -- and I -- I don't mean to
21 be cavalier about it, but I -- I don't see any possible
22 basis for keeping this under seal.

23 THE COURT: Thank you.

24 Mr. Gelernt and Mr. Velchik, can you
25 approach to side bar.

1 (BENCH CONFERENCE.)

2 THE COURT: This portion of the record will
3 be under seal for the moment. So speak a little bit
4 closer, this should be relatively brief. So this
5 portion of the record will be under seal for the moment.

6 So, Mr. Velchik, this is document 49-1, can
7 you identify for me the specific information that you
8 feel is sensitive and law enforcement sensitive. I see
9 the reference to the numbers of hours, I don't see other
10 specific information that's (unintelligible) or
11 movement. So if you can -- if you can take a look and
12 identify for me what you believe is the most sensitive
13 portion.

14 MR. VELCHIK: In reference to the specific
15 hours that you identified, I think that is the part that
16 I would emphasize.

17 THE COURT: Okay.

18 MR. VELCHIK: Just as an abundance of
19 caution.

20 Yeah, certainly references to specific hours
21 are something that the government feels strongly
22 presents risks. I think -- I think it's important that
23 I emphasize that. You asked specifically about this is
24 law enforcement, but, as part of the analysis, I would
25 include not just cost but also like what the probative

1 benefits.

2 There is ongoing litigation in other courts,
3 I think there are other plaintiffs raising claims where
4 some of that information might actually be necessary for
5 a legal determination. We believe that the plaintiffs,
6 the named plaintiffs in this case all have actual notice
7 and so some of those things aren't necessary for a legal
8 decision on some of the issues that we think are
9 adequately or correctly presented before this court. So
10 I think that also forms our analysis.

11 THE COURT: Okay. Thank you. And so we're
12 un -- I unseal this portion of the record, so everything
13 that has been said here is not sealed so you can return.

14 (OPEN COURT.)

15 THE COURT: The public has a general right
16 to access and inspect judicial records. I find that the
17 disclosure of form AE -- AEA-21B and the declaration of
18 Mr. Cisneros would not reveal confidential investigative
19 methods, thought processes or jeopardize an ongoing or
20 future investigation and would not pose a risk of harm
21 to any individual.

22 In particular, Mr. Velchik noted that the
23 sensitive information concerned the number of hours that
24 individuals who were designated as enemy aliens would
25 have to notify the government that the person intended

1 to file a petition for habeas relief and the number of
2 hours that the person would have to actually file the
3 habeas action before the government would move forward
4 with removal.

5 That's obviously not part of any
6 investigation because the person's already in custody
7 and has been detained, will not affect any rights or --
8 or any ongoing investigation as to that individual, and
9 it's hard to determine how that would affect
10 investigation as to other individuals for the public to
11 know how much notice the government is providing to
12 designated enemy aliens.

13 So the Motion to Unseal Cisneros Declaration
14 is granted. I direct the clerk's office to unseal
15 document 49-1.

16 The next -- the next matter is the Motion to
17 Proceed Under Pseudonym. Does the government oppose
18 that motion, that's document number 5?

19 MR. VELCHIK: The government does not
20 oppose.

21 THE COURT: Okay. So the Motion to Proceed
22 Under -- Under Pseudonym's, document number 5, is
23 granted and we will continue in this proceeding using
24 the initials of the individuals.

25 I have a number of questions on different

1 topics that the Motion for Preliminary Injunction and
2 the Motion to Certify Class raise. I don't plan to
3 cover all the issues that the motion and the briefs
4 raise, but have questions on some issues that I think
5 will facilitate my consideration of -- of the pending
6 motions.

7 At the end of my questions, I will give each
8 side ten minutes to present on any other issues that we
9 have not covered or that you may want to emphasize to
10 the court. So you can sort of keep track of the topics
11 that we cover and then choose to either mention
12 something we haven't raised or emphasize a particular
13 point that we have covered.

14 On the first matter I want to talk about is
15 the removal of the named petitioners. So this is
16 related to J.A.V., J.G.G. and W.G.H. Question for
17 respondents: Has the United States Government provided
18 notice to any of the named petitioners, the three, since
19 the Supreme Court's J.G.G. decision and the notice being
20 that they are an enemy alien under the proclamation and
21 subject to removal under the AEA?

22 MR. VELCHIK: The government is not aware at
23 this time. We understand that the three named
24 plaintiffs have actual notice of their ability to
25 proceed in habeas, they have done so, we are here, and

1 the government has no plans to remove them pending
2 resolution of this litigation. We think that this is
3 the appropriate vehicle to evaluate the claims that they
4 have as recognized by the Supreme Court's decision in
5 J.G.G.

6 THE COURT: So those are my follow-up
7 questions, right, do -- do you -- are you representing
8 that the United States will not remove or deport any of
9 the named plaintiffs based on the AEA and the
10 proclamation during the pendency of this lawsuit?

11 MR. VELCHIK: That is my understanding of
12 the government's position, yes.

13 THE COURT: Okay. And -- and do -- are you
14 representing that the United States will not transfer
15 the named plaintiffs outside of the Southern District of
16 Texas during the pendency of this lawsuit?

17 MR. VELCHIK: Certainly the government is
18 complying with the Temporary Restraining Order this
19 court has issued and that would be a reasonable like
20 constraint to preserve jurisdiction under this court.

21 THE COURT: Well, the question is whether I
22 issue a preliminary injunction. So the question is, if
23 I don't issue a preliminary injunction, will the
24 government nevertheless not transfer the named
25 plaintiffs outside of the Southern District of Texas

1 during the pendency of this lawsuit?

2 MR. VELCHIK: The government has no
3 intention to transfer them out of the pend-- out of this
4 jurisdiction pending their lawsuit. We believe this is
5 the appropriate vehicle to do so. We think this is an
6 appropriate arrangement to pursue their claims as they
7 remain detained here. This is a proper venue.

8 THE COURT: And just to make sure, as
9 intentions sometimes change, does the government
10 stipulate that during the pendency of this lawsuit the
11 government will not transfer the named plaintiffs
12 outside of the Southern District of Texas?

13 MR. VELCHIK: While considering the claims
14 under the Alien Enemies Act, provided there's no
15 independent basis to remove them under Title 8, we think
16 that that is an appropriate stipulation.

17 I -- I'm not aware of any intention to -- to
18 move them and we think this is the appropriate forum for
19 them to litigate their claims under the AEA.

20 THE COURT: Okay. And -- and you're
21 choosing words carefully, but I receive your statement
22 as an agreement and representation by the United States
23 that during the pendency of this lawsuit it will not
24 transfer the named plaintiffs outside of the Southern
25 District of Texas during the pendency of this lawsuit.

1 If the United States Government, I know
2 you've indicated that the United States doesn't intend
3 to give notice to the named petitioners, but if the
4 United States Government provided notice next week,
5 tomorrow, to any of the named petitioners that he is an
6 enemy alien under the proclamation and subject to
7 removal under the AEA, would that individual have to
8 restart his habeas action?

9 MR. VELCHIK: No. I think that with respect
10 to those named plaintiffs, this is an appropriate forum.
11 Government has no intention to -- to force them to
12 re-litigate that. They've filed, the court properly has
13 jurisdiction over these claims, we believe.

14 THE COURT: Okay.

15 And so, Mr. Gelernt, given the responses
16 by -- by the government as to the named plaintiffs, why
17 does the court need to enter a preliminary injunction?
18 Don't the representations by the respondents provide the
19 named plaintiffs the same protection that they seek
20 through the Motion for Preliminary Injunction?

21 MR. GELERNT: Your Honor, so I think in
22 light of your clarifications, either there was a lot of
23 talking about intentions and -- and you sort of boiled
24 it down to we will not, and I understand the government
25 now to be stipulating that they will not move them out

1 of the district or remove them out of the country on the
2 basis of the Alien Enemies Act. I think that, we -- we
3 would trust the government to -- to abide by that
4 stipulation to the court.

5 I think the real danger for us is this is
6 exactly what happened in the Northern District of Texas
7 before Judge Hendrix. The government said --

8 THE COURT: Well, let me stop you there.

9 MR. GELERNT: Okay.

10 THE COURT: That raises the issue of the
11 class.

12 MR. GELERNT: Right.

13 THE COURT: But as to the named plaintiffs,
14 no indication that the named plaintiffs in the matter
15 pending before Judge Hendrix have been attempted to be
16 removed or --

17 MR. GELERNT: Right.

18 THE COURT: -- or transferred, correct?

19 MR. GELERNT: That's our understanding, yes.

20 THE COURT: So we'll get to the issue of the
21 class.

22 MR. GELERNT: Okay.

23 THE COURT: All right. So under -- under
24 appropriate circumstances, a court can convert a Motion
25 for Preliminary Injunction into a Motion for Summary

1 Judgment, particularly on -- on legal issues. Here,
2 given the government's representations, there is no need
3 for the court to issue a preliminary injunction as to
4 the named plaintiffs.

5 But they continue to advance their attacks
6 on the President's application of the AEA through the
7 proclamation, the court's going to have to reach those
8 issues at -- at some time, the parties have presented
9 substantial briefing on those issues.

10 And -- and I know we've been operating under
11 an abbreviated briefing schedule, the legal issues have
12 been raised in similar litigation in various courts
13 and -- and the briefs that the parties have presented
14 are substantial and are -- are well prepared.

15 On the -- on the legal issues that the
16 Motion for Preliminary Injunction raises, and as to the
17 named petitioners, does either party object to the court
18 converting the Motion for Preliminary Injunction into a
19 Motion for Summary Judgment so as to issue a -- a
20 summary judgment either way on that issue?

21 First from petitioners?

22 MR. GELERT: We do not, Your Honor.

23 THE COURT: Okay. From respondents?

24 MR. VELCHIK: No, Your Honor. And I think
25 doing so would be consistent with the government's

1 interest in facilitating a timely resolution of these
2 important issues.

3 THE COURT: Okay. Thank you.

4 Any other evidence or legal arguments, in
5 particular evidence that either side believes they would
6 present with a Motion for Summary Judgment if we sort of
7 followed a more traditional approach and -- and did not
8 raise it for some time period? Anything else that you
9 would submit from the petitioners, Mr. Gelernt?

10 MR. GELERNT: Your Honor, we would just ask
11 for 24 hours to see whether there's additional
12 information we need to present with respect to the now
13 unsealed declaration. As Your Honor knows, we didn't
14 get that till this morning, the actual attachment and
15 the actual declaration till very late, well after the
16 government was supposed to respond. So we would just
17 ask for 24 hours to examine it a little bit more
18 carefully to see whether there's anything we need to put
19 in, but I suspect there won't be, but I would ask the
20 court's indulgence for that.

21 THE COURT: Understood.

22 And then from the respondents, anything
23 else?

24 MR. VELCHIK: We would also use additional
25 time if provided to the opposing side on --

1 THE COURT: Well, the -- the -- my
2 understanding is Mr. Gelernt is asking for an extra day
3 just to file a supplemental reply to exhibit D, document
4 49-1, on that limited issue. That's -- that's the
5 respondents document --

6 MR. VELCHIK: Right.

7 THE COURT: -- so you've submitted that
8 and -- and I'm considering that. Any other evidence
9 that the -- the government would submit if I allowed
10 more time to consider this as a Motion for Summary
11 Judgment in a more traditional schedule?

12 MR. VELCHIK: I can't think of any at this
13 time.

14 THE COURT: All right. Thank you.

15 So as to the named petitioners, I convert
16 the Motion for Preliminary Injunction into a Motion for
17 Summary Judgment and notify the parties of my doing so.

18 To the extent that I certify a class, I will
19 do the same and convert the Motion for Preliminary
20 Injunction as to the class into a Motion for Summary
21 Judgment. The issue of whether I certify a class, of
22 course, is -- is separate.

23 One, I -- I do grant the petitioners until
24 tomorrow, April 25th, to file a supplemental reply with
25 argument and/or additional evidence related to the

1 declaration of Mr. Cisneros, that is document 49-1.

2 MR. GELERNT: Thank you, Your Honor.

3 THE COURT: So now, Mr. Gelernt, one caveat
4 on my converting it into a Motion for Summary Judgment,
5 given the respondent's position, can I reach the named
6 petitioners challenge regarding the notice procedures?
7 Right, the -- the intent of the notice procedures is to
8 allow the individual designated as the enemy alien to
9 seek relief in habeas. The named petitioners have done
10 so.

11 Even if I conclude that the named
12 petitioners are correct that the government's notice and
13 procedures are inadequate, don't satisfy the -- the AEA
14 based on the language that the Supreme Court in J.G.G.,
15 there's no relief that would stem from that conclusion,
16 is there? It would effectively be an advisory opinion
17 as to the named petitioners, would it not?

18 MR. GELERNT: Your Honor, so this is the
19 first time we're hearing that the government is
20 stipulating and so I -- I think, you know, if necessary,
21 we would put something in about that.

22 But I -- I think you can, Your Honor, just
23 because this is a class and so the government can't moot
24 out a -- a ruling by taking the named petitioners off
25 the board. So that's sort of standard class-action law.

1 So, for that reason, I'm not sure that it
2 ultimately matters as a -- you know, as a sort of
3 practical application of this. We could always put in a
4 different named petitioner, but I don't think Your Honor
5 would have to have that because, once a class is filed
6 and the papers are on file, the government could
7 continuously moot the issues by just taking the named
8 petitioners off the board. So I don't think it's
9 necessary.

10 I think the Supreme Court did want new
11 notice. And you're right, Your Honor, that's a fair
12 point that it was to be able to file a habeas and a
13 habeas is on file, but we don't know exactly what the
14 allegations specifically will be to the named
15 petitioners. And so, in that respect, we can't assume
16 that -- that the notice won't be necessary if they need
17 to amend their habeas petition in some respect.

18 But I think it's a fair point, Your Honor, I
19 would just say that one way or the other you can
20 ultimately reach the merits because the named
21 petitioners can't be mooted, can't moot the class.

22 THE COURT: Okay.

23 And respondent, respondents have a position
24 on that point? Can I reach as to the named plaintiffs
25 the issue of whether the notice and the procedures for

1 the notice satisfy the AEA's requirements as described
2 in J.G.G.?

3 MR. VELCHIK: No, Your Honor, for the
4 reasons that you described in your analysis, the named
5 petitioners would lack standing with respect to that
6 point, the court would therefore lack jurisdiction. To
7 the extent that the court is evaluating punitive class
8 action, that would also destroy typicality or
9 commonality.

10 THE COURT: All right. Thank you.

11 Let me turn to the political question
12 doctrine. The D.C. circuit's decision in El-Shifa,
13 Judge, then Judge Kavanaugh notes in his concurrence
14 that the political question doctrine has -- had never
15 been applied to preclude review of a challenge based on
16 a federal statute as opposed to the Constitution.

17 So question first for -- for the
18 respondents: Aside from El-Shifa, are you aware of a --
19 of a court applying the political question document to
20 preclude review of a statutory challenge?

21 MR. VELCHIK: Standing here now, I cannot
22 name one specifically. But the government would
23 emphasize that the Alien Enemies Act is a very old
24 statute, dates back to the 5th Congress. It uses
25 language that is similar to language in the Constitution

1 where we think the political question doctrine is most
2 appropriate. The government continues to believe that a
3 political question doctrine precludes review of whether
4 or not the conditions have been met. And that remains
5 our argument from the brief.

6 THE COURT: And on this point, Mr. Gelernt,
7 does it make a difference that this challenge is -- is
8 statutory? Aren't -- aren't the principles the same as
9 if we were addressing the Executive Branch's
10 responsibilities and powers under, for example, the
11 invasion clause of the Constitution, don't the *Baker*
12 factors apply equally whether the Executive Branch is
13 making decisions regarding foreign policy and national
14 security based on a Constitutional provision rather
15 than -- and a statute?

16 MR. GELERT: Right. Your Honor, we think
17 it absolutely does, I think for the reasons
18 Judge Kavanaugh said and the reasons the Supreme Court
19 has increasingly emphasized in its political question
20 doctrine that when you have Congress passing a statute
21 and deciding what powers they are going to vest in the
22 Executive Branch, it's critical that the courts be able
23 to review those statutory predicates; otherwise, it's
24 essentially saying the Executive Branch can do whatever
25 they want.

1 And so I think that's why the Supreme Court
2 has never permitted the political question doctrine to
3 divest this -- any court of jurisdiction over the
4 statutory predicate. So that -- that's the first thing
5 generally about political question doctrine.

6 THE COURT: Well, let me -- let me just stop
7 you there.

8 MR. GELERNT: Yeah.

9 THE COURT: I mean, can't the same concern
10 also be raised as to constitutional issues? The courts
11 construe the Constitution to determine whether a state
12 actor has exceeded the powers that the Constitution
13 gives that state actor, isn't that the same as -- as
14 with a statute?

15 MR. GELERNT: I -- I don't think so,
16 Your Honor, for the following reason that you don't have
17 the same separation of powers question. It's a fair
18 point, Your Honor, that it does raise delicate questions
19 if the Executive Branch has completely unfettered
20 discretion to interpret the Constitution. And the
21 Supreme Court generally hasn't done that.

22 But I think what the Supreme Court is
23 getting at what Judge Kavanaugh was getting at is, where
24 Congress is acting in equal political branch, it's
25 critical that the courts ensure that the Executive

1 Branch is not taking power away from Congress.

2 And -- and I would emphasize more
3 specifically as to -- unless Your Honor doesn't want me
4 to go there right now as to the Alien Enemies Act --
5 there has always been review of the statutory
6 predicates. And I want to turn back to Ludecke, but
7 just in the J.G.G. decision that Your Honor's aware of
8 from April 7th of the Supreme Court, it specifically
9 quoted the language from Ludecke saying the construction
10 and validity of the act can be construed.

11 Otherwise --

12 THE COURT: Well, we'll get --

13 MR. GELERNT: Yeah. Okay.

14 THE COURT: I'll stop you there and we'll --

15 MR. GELERNT: Okay.

16 THE COURT: -- certainly get into those
17 issues.

18 But I have another question for you: Is it
19 your position -- yes, Mr. Gelernt -- is it your
20 position, that as part of my analysis on the issues that
21 the petitioners raise, I should weigh the truth of the
22 President's statements about Venezuela and TdA and the
23 proclamation and the -- or within the documents
24 referenced in the proclamation?

25 MR. GELERNT: Your Honor, that's a critical

1 question and I'm glad you'd give me a chance to answer
2 that. We don't think Your Honor has to reach that for
3 the following reason: We think that if you construe the
4 Alien Enemies Act in the way we have suggested and the
5 way Judge Henderson suggested and the way I think all
6 the historical materials suggest, once you construe
7 those provisions to say it has to be a foreign
8 government, not a gang that has some influence on a
9 foreign government, and it has to be a military action,
10 not a gang that commits criminal activity in the U.S.,
11 if you construe the statute that way, then I don't think
12 you need to test the validity of the factual findings
13 because nothing within the four corners of the
14 proclamation remotely says this is a military action by
15 a foreign government. And so that's all you would have
16 to do.

17 Now we do think you could review fact -- the
18 facts, the findings based on -- even under a deferential
19 standard, I don't think those findings, those -- they're
20 very conclusionary and I don't think those would stand
21 up. But we think Your Honor doesn't need to go further
22 than the -- the face of the proclamation and -- and to
23 show that it's inconsistent with the Alien Enemies Act
24 properly construed.

25 THE COURT: And I understand your position

1 regarding the definitions of invasion and foreign
2 government and whatnot, and we'll -- we'll get to that
3 here -- here in a bit, but assuming that I construe the
4 terms more in line with the respondent's position, you
5 submitted -- the petitioners submitted declarations from
6 three individuals --

7 MR. GELERNT: Yes.

8 THE COURT: -- with extensive information
9 about TdA and the government of Venezuela, the ties
10 challenging the statements within the proclamation and
11 presumably asking me to weigh that against the
12 statements in the proclamation and the, you know,
13 designation of TdA as a transnational criminal
14 organization and things of that nature, isn't that
15 exactly what the political question doctrine teaches
16 that courts should not get into, you know, engaging,
17 weighing decisions by the Executive Branch that rely on
18 intelligence and data, weighing priorities related to
19 national security and foreign policy considerations?

20 Aren't you -- at least that position seems
21 inconsistent with the principles of the political
22 question doctrine.

23 MR. GELERNT: Right. Well, well, certainly
24 not weighing priorities, I agree that that is something
25 for the Executive Branch. But factual determinations,

1 straight factual determinations, I think the court
2 always can weigh those and did do that during World War
3 II when we have cited cases.

4 Now Your Honor may decide there is some
5 deference owed to the Executive Branch, but we think the
6 declarations show that the find -- what are ultimately
7 conclusionary findings have no basis in fact. And under
8 any standard of review, we think they don't hold up. So
9 I think fact -- straight factual findings, I don't think
10 implicate the political question doctrine.

11 Now if you were to say to me can the
12 government decide TdA is more dangerous than another
13 gang and that's why we're going to prioritize them, I
14 think then we would be getting into a realm where
15 Your Honor would have to step back.

16 THE COURT: Okay. Let me --

17 MR. GELERNT: But not on the straight
18 factual findings.

19 THE COURT: Right. I understand.

20 It is relatively easier, I think, to
21 determine does a declared war by Congress exist as
22 opposed to an invasion or a predatory incursion, so
23 the --

24 MR. GELERNT: Right.

25 THE COURT: -- the three circumstances under

1 which the AEA has been previously invoked have all
2 concerned declared wars, so it was easier.

3 And I understand that's part of the argument
4 related --

5 MR. GELERNT: Yeah.

6 THE COURT: -- to the definition of those
7 terms, but here it's based on invasion, predatory
8 incursion --

9 MR. GELERNT: Right.

10 THE COURT: -- threatened invasion,
11 predatory incursion, how do I weigh that without getting
12 into sensitive intelligence and data that the Executive
13 Branch holds?

14 MR. GELERNT: Well, well, so here -- here's
15 what I would say, Your Honor, and I think that
16 Judge Henderson laid it out nicely, that it would still
17 have to be a military invasion or incursion. And so I
18 think that's the key. And because it's paired with
19 declared war, I think that's what Congress was getting
20 at, that's what all the historical materials suggest.
21 And, again, that's what Judge Henderson said. So once
22 you find that it has to be a military invasion, I don't
23 think that the findings go anywhere near a military
24 invasion.

25 And I would look at the government's own

1 evidence, if you were going to go there, the -- the
2 Smith declaration the government put in about TdA uses
3 the word criminal or crime 15 times and says this is a
4 law enforcement matter. Never once suggests that TdA is
5 engaging in military activity.

6 So as long as Your Honor was defined that it
7 has to be military, then I don't think it matters how
8 dangerous TdA is, how much the President thinks TdA is
9 engaging in incursion in the U.S. I think right there,
10 that -- the government's own declaration, again the
11 Smith declaration, shows that even the government is not
12 really suggesting this is military in nature.

13 THE COURT: Okay. Thank you.

14 Mr. Velchik, sort of looking at it from the
15 other side, Supreme Court has confirmed that an
16 individual subject to detention and removal under the
17 AEA is entitled to judicial review as to questions of
18 interpretation of the statute.

19 Doesn't that right include the court
20 defining the terms of the AEA to determine whether the
21 Executive Branch has exceeded the scope of the AEA?

22 MR. VELCHIK: Certainly the Supreme Court's
23 decision in J.G.G. emphasized that there were factual
24 determinations left to review. We acknowledge that it
25 also included language about the constitutionality in

1 the interpretation of the AEA.

2 The AEA has several sections, there may be
3 some legal terms that may be amenable to interpretation
4 and others may not, I think that this court and
5 plaintiffs have focused on two terms in particular, one
6 of which is the condition about whether there's a
7 declared war or a predatory incursion or even a
8 threatened predatory incursion.

9 For some of the reasons raised by this
10 court, that particular determination could be precluded
11 by the political question doctrine and yet there could
12 be other portions of the statute that might be more
13 amenable to judicial review.

14 I think in particular also emphasize, when
15 it comes to a predatory incursion, there could be
16 evolving situations with military -- with military
17 incursions. If a court were to say today, you know,
18 this does or does not satisfy a threatened predatory
19 incursion, does that hamstring the ability of the
20 Executive to alter that determination or to try again in
21 other case? I think there are a number of complications
22 in addition to the judicial amenable standards that this
23 court has raised.

24 A second term of -- of art -- legal term of
25 significance that has been challenged has been a foreign

1 nation or government. And whether or not TdA satisfies
2 that, I think, is also amenable to the same arguments
3 about it's a political question. But I think that there
4 are also additional reasons to suggest that it might be
5 inappropriate for a court to second guess the
6 President's determination there.

7 I mean, in particular, Zivotofsky, you know,
8 clarifies that the Executive Branch uniquely holds the
9 power of recognizing foreign nations. And that might
10 also further counsel of limited review of that term.

11 But, overall, I think the -- the structure
12 with which I would analyze the question is, that as a
13 threshold determination, we think that those two
14 questions are political questions not subject to review
15 by a court.

16 I think that there is a second option which
17 is that this court could review the face of the
18 President's proclamation to see whether it comported
19 with the requirements of the AEA.

20 And then I think there's a third layer,
21 where if this court, if it so chose, could engage in
22 empirical fact finding investigations to determine
23 whether or not there really is a declared war, predatory
24 invasion by a foreign government.

25 There's evidence in the record that -- that

1 both sides have submitted, I think that there are a
2 number of -- of problems with a court weighing those
3 determinations. And so our first argument is that --
4 that both questions are subject to the political
5 question doctrine.

6 But even if they are reviewable by a court,
7 we believe that there's enough on the face of the
8 President's proclamation, the State Department's
9 designation of TdA as a foreign terrorist organization,
10 offer this court to engage in interpretation to satisfy
11 the Supreme Court's direction for review in this case.

12 THE COURT: Now you argue in your response
13 that as for whether the acts preconditions are satisfied
14 that is the President's call alone. The federal courts
15 have no role to play.

16 Is it your position that the President under
17 the AEA and its powers has the authority to define what
18 an invasion or a predatory incursion includes and then
19 declare that an invasion or declaratory -- or predatory
20 incursion has occurred, been attempted or been
21 threatened based on his own definitions?

22 MR. VELCHIK: Yes, for the -- the same
23 framework that I think I explained.

24 THE COURT: I mean, doesn't that render the
25 President's powers under the AEA effectively limitless?

1 MR. VELCHIK: The AEA is an emergency
2 authority and we do recognize that the political
3 question does limit judicial review in certain
4 circumstances, but courts have done so in the context
5 of -- of foreign affairs and national security.

6 But even if this court does interpret those
7 terms for itself, we believe that applying traditional
8 tools of statutory interpretation, combined with what we
9 think would be the appropriate deference to the
10 Executive Branch, would still satisfy the plain meaning
11 of those terms as they've commonly been understood at
12 law and at the time that the act was passed.

13 THE COURT: I mean, there are various
14 decisions by the Supreme Court and lower courts that
15 have defined terms of the AEA and citizen, denizen, that
16 phrase. For example, doesn't that reflect that when
17 J.G.G. confirms prior decisions that questions of
18 interpretation of the statute are subject to judicial
19 review, in part, at least means that courts get to
20 define the words of the statute and then determine
21 whether what the President has proclaimed falls within
22 that definition?

23 Not gauge the facts, whether those purported
24 facts are true or not, but is what is described in the
25 proclamation fall within the defined terms of invasion

1 and predatory incursion as commonly, ordinarily
2 understood at the time of its enactment?

3 MR. VELCHIK: Yes, we acknowledge those
4 authorities. There are also a number of other
5 authorities that do speak in quite broad terms about the
6 AEA being unreviewable, but, yes, we do believe that the
7 President's proclamation and his exercise of those
8 authorities in this particular case would satisfy a
9 judicial review of all the appropriate terms as they've
10 been used in this case.

11 THE COURT: Thank you.

12 Mr. Gelernt, in looking at the President
13 Roosevelt's invocation of the AEA in December 1941, the
14 proclamation he issued includes no facts, at least
15 from -- from my review of it, it merely declares that
16 Japan had invaded the United States, declares that
17 Germany and Italy threatened to invade the
18 United States.

19 No one appears to have challenged the
20 proclamation, so we don't have a judicial determination
21 of whether that was appropriate or not, but doesn't
22 FDR's invocation of the AEA in that matter support the
23 idea that a president effectively can merely declare
24 that the exigencies or conditions necessary to invoke
25 the AEA exist without having to provide any additional

1 information?

2 MR. GELERNT: Yeah, Your Honor, so I feel
3 like what is happening to us is that the government is
4 asking us to fit a square peg into a round hole rather
5 than them doing so.

6 And as Your Honor has noted, the
7 proclamation -- I mean, the Alien Enemies Act has been
8 around since 1798. It's only been used three times in
9 the country's history, all during declared wars.

10 I don't think that someone thought, well,
11 maybe I can walk into court and say the United States is
12 not at war. And so I think those are the reasons why
13 these types of questions haven't arisen because every
14 other administration back to 1798 has understood we use
15 this only during a declared war. And even during those
16 declared wars, we're not aware of any removals except
17 World War II. So we -- we do think that the
18 proclamation would have to make findings. I think the
19 Alien Enemies Act, the way the Supreme Court has
20 suggested it, do need to make findings.

21 And I think, you know, just to re-emphasize
22 Your Honor's point about J.G.G. must have meant
23 something, the Supreme Court must have meant something
24 in quoting that language you can construe the act;
25 otherwise, the government -- the President could

1 literally name anybody, any gang under the proclamation.
2 That can't be what Congress meant.

3 You know, I -- I don't need to sort of
4 belabor the point, but every religious and ethnic group
5 in this country has been tied to some criminal
6 organization at some point in the past. It would mean
7 the President could literally do whatever he wanted and
8 all of a sudden people within 12 hours could be in a
9 Salvadorean prison.

10 And so, you know, not only is it J.G.G. but
11 they did quote Ludecke. And Ludecke, contrary to the
12 government's understanding of it, did actually construe
13 the terms and reach the merits. So what the individual
14 in Ludecke walked into court and said is: There's no
15 declared war. Meaning, I want to construe the declared
16 war term because there's no longer a shooting war in the
17 Supreme Court's terms. There's no longer actual
18 hostilities.

19 And the Supreme Court said: We're going to
20 construe declared war not to mean that there has to be
21 actually shooting going on. Only after it construed the
22 term to mean it doesn't have to be actual shooting at
23 the time did it then go to say and then Congress and the
24 President will decide when to declare the war over.

25 In case after case, as Your Honor has

1 pointed out, construed statutory terms; otherwise, there
2 would literally be unlimited power. Congress passed a
3 very specific statute and I think it goes to the fact
4 that we are not here --

5 THE COURT: Let me stop you there for now --

6 MR. GELERNT: Yeah, I'm sorry, Your Honor.

7 THE COURT: -- and move on.

8 Just a follow up to -- to Mr. Velchik, on
9 this issue of limits, under your position, could the
10 President determine that an invasion or predatory
11 incursion has occurred -- and this is a hypothetical so
12 those are always tricky, but -- that -- that a foreign
13 nation has sent or intends to send agents to the
14 United States to obtain positions of authority in
15 corporate America and from there make decisions that
16 destabilize the nation's economy?

17 Is that enough? And that's an invasion
18 under the proclamation. If the President gets to define
19 the terms and then declare that it exists, would the
20 President be able to invoke the statute for mere
21 economic injury, the stealing of intellectual property
22 by a foreign nation?

23 MR. VELCHIK: Certainly if the political
24 question precludes judicial review, that would limit the
25 ability of courts to second guess those determinations

1 even in some of the hypotheticals that you've raised.

2 THE COURT: Well, that's your position, it
3 does preclude political review. So you're saying that
4 it would preclude judicial review in that scenario?

5 MR. VELCHIK: And under those scenarios, I
6 mean, there would also be checks on the Executive
7 Branch. A lot of the sorts of questions that are
8 uniquely committed to the Executive Branch under the
9 political questions doctrine for which there's not
10 judicial review, there are other mechanisms for
11 accountability: This includes impeachment, democratic
12 elections, so there are other backstops to second
13 guesses and terminations even if judicial review is not
14 available.

15 However, if judicial review is available, we
16 do think that the facts are very different from that
17 hypothetical and fall squarely within the terms as
18 they're commonly understand.

19 THE COURT: Okay. And -- and, Mr. Gelernt,
20 right, Mr. Velchik mentioned, I think it's Judge Story
21 in one of the decisions references, I think it's under
22 the militia act, but, you know, can this be abused?
23 Yes, as any statute can be abused. But when it's a
24 matter that is political in nature, the remedy is the
25 political process. It's impeachment or the next

1 election or -- or Congress amending the statute. So if
2 the AEA, if I determine that it should be construed
3 broadly, isn't the appropriate remedy the political
4 process and not the courts trying to determine or -- or
5 limiting the President's powers under it that were not
6 intended at the beginning?

7 MR. GELERNT: Yes, Your Honor, a -- a few
8 things. One is that obviously the Supreme Court has
9 decided that the political question doctrine should be
10 narrowed in recent times. And that is why I think
11 Judge Kavanaugh has pointed out that he's not aware of
12 any time, even back in the day when statutes weren't
13 construed, but certainly now the Supreme Court has
14 emphasized it.

15 But I think your question assumes that you
16 are going to review the statute at least to decide what
17 the terms are. And so I think that goes beyond even
18 what the government is saying you can do. I mean, if
19 you can't review the statutory terms and there's
20 literally no check and -- and it's not -- the
21 political -- the political process can't be to check if
22 there's a statute, Congress was very clear in
23 (unintelligible).

24 And what I was going to say before is that
25 it's not as if we're here saying you have two choices:

1 Either they can't use the Alien Enemies Act or let
2 everyone roam around even if they think they're
3 dangerous. No one's saying they can't be criminally
4 prosecuted, no one's saying they can't be removed under
5 the immigration laws. And, in fact, there's an alien
6 terrorist court that allows them to use special
7 procedures. No one's saying --

8 THE COURT: Well, I'll stop you there, I
9 think you're getting off point, but I understand the
10 point.

11 MR. GELERNT: Yeah, no, I --

12 THE COURT: And I agree that the ultimate
13 outcome of this lawsuit does not result, at least -- at
14 least as to the named petitioners, the release of the
15 individuals. They're not seeking release.

16 MR. GELERNT: Right.

17 THE COURT: They're seeking adjudication or
18 the ability to proceed under Title 8 in the immigration
19 courts and the procedures that are set forth there.

20 MR. GELERNT: Yeah. And so, Your Honor, I
21 just --

22 THE COURT: But let -- let me turn to a
23 different topic.

24 MR. GELERNT: Okay. Well, I was just going
25 to -- I apologize.

1 THE COURT: Well, I'll just --

2 MR. GELERNT: Okay.

3 THE COURT: You'll have your ten minutes at
4 the end.

5 MR. GELERNT: Okay. I'm sorry, Your Honor.

6 THE COURT: The -- turning to the definition
7 of invasion and predatory incursion, so, first, the --
8 the respondents, just to understand your proposed
9 construction, how do you distinguish between an invasion
10 and a predatory incursion for purposes of the AEA?

11 MR. VELCHIK: So the text of the AEA
12 references declared war, which we think is a
13 well-defined term under the Constitution.

14 THE COURT: Correct. I don't think that's
15 at issue here.

16 MR. VELCHIK: Correct. But I would
17 emphasize that invasion does appear in the text of the
18 Constitution under suspension clause. And to the extent
19 that there are legal authorities interpreting it there,
20 that would also be probative of its interpretation in --
21 in this case.

22 Just applying purely textual tools of
23 statutory construction, I would emphasize that the text
24 of the AEA in this section is remarkably expansive when
25 compared to any other provision either of the

1 Constitution or other similar statutes.

2 There are some provisions in the
3 Constitution section that do turn on a declared war, and
4 that has a legal significance, the suspension clause
5 speaks of invasion or rebellion. But here we have the
6 inclusion not only of those terms, but also predatory
7 incursion. And we think that the inclusion of predatory
8 incursion, alongside those other two terms, reflects
9 Congressional intent that the scope of the AEA must be
10 substantially broader; otherwise, you'd be rendering the
11 term predatory incursion nukatory (ph).

12 We also think that those three terms are
13 also read in the same sentence alongside. There --
14 there's a three-term series about whether it's
15 threatened, and so I think that is further evidence of
16 Congressional intent to be quite expansive in scope.

17 We think that interpreting those terms
18 should be expansive because they are. And it also
19 reflects a certain amount of deference to the Executive
20 Branch to define that falls anything within either of
21 the three terms or even the threat of those three terms.

22 In addition to strictly looking at the text
23 of the statute, we also believe it's appropriate to look
24 at the original understanding and the history.
25 Certainly at -- at the time of the founding under the

1 5th Congress, the United States not only engaged in
2 formal wars with other traditional European sovereigns,
3 but also dealt with other groups that presented threats
4 to national security of the United States, whether these
5 were predatory attacks by Indian tribes, there were the
6 Barbary pirates under Thomas Jefferson, and then even
7 today the United States Government continues to deal
8 with other threats from entities, governments or
9 terrorist organizations.

10 There's obviously case law on al Qaeda and
11 increasingly --

12 THE COURT: Let me stop you there.

13 MR. VELCHIK: Yes, sir.

14 THE COURT: So, I mean, on this issue, you
15 note in your response a couple of dictionary definitions
16 that include -- that have a meaning broader than some of
17 the definitions in other documents that petitioners
18 present to the court, are you aware of -- of secondary
19 sources, such as letters or pamphlets, using invasion or
20 predatory incursion, or just incursion for that matter,
21 in a manner that does not expressly refer to or imply
22 military activity or a military context?

23 I mean, it -- it's understood, I think, I
24 accept that the promulgation of the AEA was with a
25 potential war with France in mind on the -- the

1 potential imminence of a war. That doesn't necessarily
2 mean that all the phrases of the AEA have to be read in
3 a military context, what we're looking for is the plain
4 ordinary meaning of what those words meant in that
5 society at that time.

6 And so we -- we look for the usages of those
7 terms within the various sources. There are some that
8 petitioners have presented that are very clearly
9 military in context, but I don't think that the
10 respondents presented those types of usages other than
11 other definitions exist.

12 Are you aware, you know, the pirates, you
13 know, the -- the settlers in the west and perhaps
14 incursions by native Americans, or -- or the French who
15 were out there, were these terms also used to refer to
16 those kinds of incursions?

17 MR. VELCHIK: I believe so. We agree with
18 the court that it's appropriate and the court can take
19 legal notice of authorities that are contemporaneous
20 that use those terms, whether they be letters or
21 otherwise, even if they haven't appeared in this brief.

22 I don't have a citation off the top of my
23 head.

24 THE COURT: Did you provide any to the court
25 other than the dictionary definitions in your briefing?

1 MR. VELCHIK: I mean, we have what's in the
2 brief, which we refer to the court. I would emphasize,
3 though, I think even just entomologically, like
4 predatory invasions, I think, implies raids, which is
5 somewhat distinct from a formal, you know, like military
6 with tanks rolling across a -- a border.

7 THE COURT: Well, well, I'll stop you there.

8 MR. VELCHIK: Yes, sir.

9 THE COURT: I mean, you're -- you're giving
10 me your view of what the words mean --

11 MR. VELCHIK: I understand.

12 THE COURT: -- in our society today. We --
13 we obviously were looking at what those words could have
14 meant at the time, which I think we can only determine
15 based on sources from -- from that time.

16 But let me ask you a separate question. In
17 your briefing, you acknowledge a time that the AEA is a
18 war time act. And, for example, it appears you argue
19 that because of that the restrictions within the INA
20 don't apply, that this essentially trumps the INA
21 Title 8 because it's a war time act.

22 I mean, doesn't that argument support the
23 petitioner's point that the conditions required to
24 invoke the AEA should include a military context that
25 effectively amount to war or imminent war?

1 MR. VELCHIK: No. Our analysis of reading
2 Title 8 and the AEA proceeds chronologically where the
3 AEA was originally enacted in 5th Congress, obviously
4 the INA was passed much later. Under the traditional
5 rules of a statutory interpretation, courts do not
6 lightly interpret -- interpret implied repeals.

7 We think that whatever the appropriate
8 interpretation of the AEA was enacted, that continues to
9 be a discreet mechanism to remove individuals. It is
10 codified in a separate title dealing with national
11 security events, but we -- we regard that as an
12 independent mechanism to remove individuals separate
13 from Title 8.

14 THE COURT: Okay. And I think I -- just --
15 just to confirm, to the extent that courts have
16 construed the meaning of invasion as used in the
17 Constitution, that would be relevant to the meaning of
18 invasion as to the AEA, is that accurate from your point
19 of view?

20 MR. VELCHIK: It is correct that to the
21 extent that courts have interpreted the meanings of one
22 word in one text that may be probative of its meaning in
23 another text, it does not mean that they are identical
24 or that it collapses but certainly it would be
25 probative.

1 THE COURT: And that principal applies to
2 the word invasion in the AEA?

3 MR. VELCHIK: Yes, correct. Particularly in
4 light of the -- the timing of the two texts.

5 THE COURT: On -- on the issue of foreign
6 nation or government, are you aware of any historical
7 record that uses foreign nation, foreign government to
8 refer to a non-political entity or organization, for
9 example, a fraternal order, a society, as opposed to a
10 society or a group of people who are subject to
11 governance and legal judicial political recognition?

12 MR. VELCHIK: We have the authority cited in
13 the brief. I would emphasize, that in the AEA, the text
14 includes a foreign nation or a government and those
15 terms are used together and that suggests that they are
16 not fully overlapping.

17 The fact that the term government appears
18 next to foreign nation suggests that the scope of the
19 AEA must be more expansive than might be traditionally
20 interpreted solely from the term foreign nation itself.

21 THE COURT: Correct. Right. And one
22 question I did have for both sides, because I'm not sure
23 that it's briefed as distinctly as it could be, is there
24 a distinction between foreign nation and foreign
25 government for purposes of the AEA? You know, what's

1 the position of respondents on that?

2 MR. VELCHIK: Yes. The -- the very fact
3 that the text of the statute refers to both indicates
4 that -- that they are not co-extensive. Again, we also
5 think that the inclusion of not just invasion but
6 predatory incursion, you know, presupposes the sort of
7 other sorts of entities that might be engaging in raids
8 other than the traditional format of a foreign nation
9 engaging in a traditional war.

10 THE COURT: And -- and from petitioners on
11 that point, distinction between foreign nation, for --
12 and -- and I read it as foreign nation or foreign
13 government.

14 MR. GELERNT: Right. That's the way we read
15 it, Your Honor. We have been digging through historical
16 materials, haven't found anything where Congress
17 specifically addressed it, but I do think that foreign
18 government is the entity that makes treaties, nation has
19 a sort of broader term of un -- with citizens and
20 denizens. And I think that, you know, is, as Your Honor
21 knows in the Alien Enemies Act, is, you know, citizens,
22 denizens. So I think they both refer to a formal nation
23 government type, foreign as Your Honor as pointed the
24 out.

25 THE COURT: Thank you. And let me follow

1 up, Mr. Gelernt, here. Proclamation states TdA has
2 control over portions of Venezuela, that the government
3 of Venezuela has ceded control of certain territories
4 over Venezuela. If I accept that statement as true,
5 isn't that an indication that TdA is governing in that
6 portion of Venezuela?

7 MR. GELERNT: Your Honor, I don't think that
8 the proclamation actually says they currently have
9 control over any particular area of Venezuela. But even
10 if they did, Your Honor, I don't think that goes to them
11 being the foreign government or nation who has citizens
12 and denizens who can make treaties with other nations.
13 I think that would be a stretch. I -- I think you could
14 look at almost any country, including ours, where, you
15 know, there may be a gang that has significant control
16 over a few blocks.

17 And I think that's what the proclamation
18 seems to be getting at. But, even then, it's not saying
19 they currently have control over particular areas, much
20 less they're acting as the government.

21 But they certainly -- I don't -- the -- the
22 proclamation nowhere says and none of the affidavits
23 suggest that TdA is the government, is the nation.

24 And so the fact that they have influence
25 over a few blocks, potentially, or a few areas is no

1 different than in a lot of places. That can't be
2 what -- what Congress meant.

3 THE COURT: And -- and I guess to push a
4 little bit on that point, I think they do say that
5 Venezuela and TdA are indistinguishable. Which, it --
6 it may not be that -- or, effectively, as I read one
7 possible read of the respondent's position is that the
8 proclamation effectively says it is Venezuela that is
9 through TdA that is engaged in these activities.

10 If that's the reading of the proclamation
11 that's appropriate, then Venezuela's certainly a foreign
12 nation or government.

13 MR. GELERT: Your Honor, if they're
14 literally saying TdA is the foreign government and TdA
15 and Venezuela are literally the same thing, then we
16 would have a different case. I think when -- when
17 Your Honor goes back and looks at the proclamation,
18 you'll see that they don't actually go that far.

19 And the affidavits describing TdA don't
20 actually say, nowhere do they actually say TdA is the
21 foreign government or nation, TdA can make treaties, TdA
22 has denizens, TdA is the equivalent of the Venezuelan
23 government. That's been recognized by our country.

24 I think we have not recognized TdA,
25 obviously that would come with enormous implication

1 consequences if we were to recognize TdA, if TdA were to
2 take a seat at the U.N. There -- there's some careful
3 wording but they stop very -- they -- they stop very
4 much short of saying TdA is the government or nation.

5 THE COURT: I don't think that respondents
6 are saying TdA has become the government of Venezuela.
7 But I think their position is that, through the
8 infiltration of TdA into the Maduro government, Maduro,
9 as the claimed President of Venezuela, is directing the
10 conduct of TdA members, directing them to come to the
11 United States and engaged in certain described
12 activities.

13 Doesn't that effectively mean that the
14 proclamation is pointing to Venezuela as the actor
15 through TdA as its agents?

16 MR. GELERNT: Yeah, Your Honor, I -- I --
17 it's a fair question. I don't think that the
18 proclamation fairly read is suggesting -- I mean, well,
19 let me -- let me step back one second.

20 Obviously that doesn't go to invasion or
21 incursion and we still have that military point, but I
22 know Your Honor is getting at the foreign government
23 point. I think it stops short of suggesting that Maduro
24 is actually -- that this is a wing of the Venezuelan
25 government. And if you were to going to reach the

1 facts, the -- the declarations are crystal clear that
2 there is zero support for that.

3 But I -- I think the proclamation in our
4 view fairly read does not suggest that TdA is acting as
5 a wing of the Maduro government. And certainly there's
6 zero support out there in the world for that.

7 THE COURT: And -- and so, Mr. Velchik,
8 on -- on that point, what is the respondents position?
9 There's a line in the response, if I remember correctly,
10 that indicates that TdA and Venezuelan government are
11 indistinguishable. I read that respondents claiming
12 that effectively it is Maduro as the claimed President
13 of Venezuela directing these activities. Is that the
14 government's position?

15 MR. VELCHIK: Yes. The brief reflects that
16 there's articulation of the government's position. I
17 think your analysis of respondent's position, I think,
18 has been accurate.

19 Analytically, I mean, I'll point out that
20 one way of approaching this problem could be to say
21 well, Venezuela is the foreign nation or foreign
22 government. I think it would clearly satisfy the
23 meaning of foreign nation in that term and that the
24 President's exercise of the Alien Enemies Act is very
25 limited in only applying to the TdA members.

1 I -- I think another argument could be that
2 TdA itself gauges in enough attributes of government
3 such that it qualifies for purposes of the AEA, but I do
4 think that the reality is much more complicated, it's
5 much more mixed.

6 There are empirical statements included in
7 the exhibit that you referenced and the statements made
8 by the President's proclamation that we think reflect
9 sort of this -- this mixed situation. But your
10 characterizations, the characterizations in the brief,
11 we believe, is accurate.

12 THE COURT: On that point, under your
13 proposed definition of foreign nation or government, is
14 it critical that a group like TdA, MS-13, Mexican
15 cartels have to, I think as the proclamation says,
16 infiltrate or be ceded control over territory to
17 constitute a foreign nation or government for purposes
18 of the AEA?

19 MR. VELCHIK: We believe that the presence
20 of those factors here make it an easy case in this
21 situation.

22 THE COURT: And -- and I guess the -- the
23 government's position is, one, it's Venezuela, so that's
24 foreign nation or government; but as to TdA
25 independently would represent a foreign government, not

1 a nation? Accurate?

2 MR. VELCHIK: Yeah, I -- yes, I think if --
3 for the argument that TdA itself qualifies under the
4 Alien Enemies Act separate and apart from its -- its
5 relationship with Venezuela, that, yes, it more
6 naturally would fall within the definition of -- of the
7 term government.

8 THE COURT: Correct. I mean, you're not
9 claiming that TdA is a nation?

10 MR. VELCHIK: No.

11 THE COURT: Going back to -- to the issue of
12 invasion, if -- if I construe invasion or we can look to
13 the word invasion under the AEA similar to the use of
14 invasion for the suspension clause, then would the
15 President or Congress have the ability under the
16 circumstances that the proclamation declares to suspend
17 the Writ of Habeas Corpus based on TdA's activities?

18 MR. VELCHIK: That is an important and
19 weighty question of Constitutional interpretation. As
20 we've discussed, the fact that the terms are similar, I
21 think, is probative of how each should be interpreted.
22 I'm not prepared at this time to say definitively what
23 would constitute a suspension for purposes of
24 interpreting the Constitution in that case, but I -- I
25 do agree that -- that that is a appropriate place to

1 look to inform this court's analysis.

2 THE COURT: Thank you.

3 Mr. Gelernt, just a couple here of sort of
4 side issues or -- or getting away from statutory
5 construction, do you agree that if the government
6 obtains a final order of removal under Title 8 as to any
7 of the named petitioners government can proceed forward
8 with removal under that statute? And so to the extent
9 that I issue a preliminary injunction, there should be a
10 carve out to allow the government to move forward with
11 removal proceedings as to the individuals under Title 8;
12 and if they obtain a final order of removal, they can
13 proceed as to that individual?

14 MR. GELERNT: Yes, Your Honor, we're not --
15 we're not arguing anything about Title 8 here.

16 THE COURT: Okay.

17 And then from Mr. Velchik, do you agree that
18 if -- if the government transferred one of the named
19 petitioners to another federal district that that
20 transfer would not affect this court's jurisdiction over
21 the named petitioners case here?

22 MR. VELCHIK: For purposes of the habeas
23 action evaluating the constitutional --
24 constitutionality -- or the interpretation of the Alien
25 Enemies Act, I think that sounds appropriate.

1 THE COURT: Correct. Right. And part --
2 one of your arguments is I have no jurisdiction to --

3 MR. VELCHIK: Correct.

4 THE COURT: -- enjoin the government from
5 transferring individuals between districts or -- or to
6 different detention facilities.

7 One concern is that the government would
8 take the position that if they transfer the individual
9 that moots or divests this court of jurisdiction over
10 the habeas action even though it existed at the time
11 of -- of the lawsuit's inception. I just want to make
12 sure you're not taking that position. If there was a
13 transfer of one of the named petitioners to another
14 federal district, I would still retain jurisdiction over
15 the habeas action that currently exists, correct?

16 MR. GELERNT: Yes. That sounds reasonable.
17 We have no intention to remove any of the named
18 petitioners pursuant to the AEA.

19 You've raised concerns about Title 8 and so
20 I just want to be clear that we wouldn't necessarily
21 foreclose the opportunity to continue proceeding with
22 cases under Title 8, but -- but I think what this court
23 said is appropriate.

24 THE COURT: Okay. Thank you.

25 Mr. Gelernt, turning to the issue of

1 voluntary departure and -- and whether the AEA's
2 prerequisites have been met through the procedures as to
3 the named petitioner. So is it your construction of
4 Section 21 that it requires that before the government
5 can detain an individual the government must afford the
6 individual the opportunity to voluntarily depart?

7 MR. GELERNT: Your Honor, I think certainly
8 before removal --

9 THE COURT: And so it's possible that the
10 government can detain an individual, notify that person
11 while in detention that the subject is -- that -- that
12 he is subject to removal as an enemy alien and from
13 within the confinement afford them the ability to leave
14 the country voluntarily?

15 MR. GELERNT: Well, I think that's right,
16 Your Honor. I think the detention question is an open
17 question. But let's assume for the moment, just in
18 answering your question, I think, if they did detain
19 them, they would have to give them a time to voluntarily
20 depart. And I think the government is conflating two
21 different parts of the statute. Section 21, as
22 Your Honor rightly pointed out, is the voluntary
23 departure provision: Do you want to voluntary depart
24 rather than us having to issue an Alien Enemies Act
25 removal order.

1 The other part that the government's focused
2 on is getting your affairs together. And the government
3 did give Germans the -- the right to get their affairs
4 together before they left. That can be overridden.

5 The voluntary departure thing can't be
6 overridden, it -- the getting your affairs together can
7 be overridden if they claim the individuals are engaged
8 in actual hostilities.

9 They --

10 THE COURT: And -- and you're referencing
11 22?

12 MR. GELERNT: Yes.

13 THE COURT: And the -- and the language of
14 22.

15 MR. GELERNT: Is about that.

16 THE COURT: But that refers to Section 21
17 for individuals designated as enemy aliens under
18 Section 21, and so I'm not sure that they're as -- as
19 distinguishable as you're arguing.

20 Doesn't Section 22 effectively describe
21 circumstances under which the ability -- ability to
22 voluntarily depart does not have to be provided to the
23 enemy alien if they're engaged in actual hostilities?

24 MR. GELERNT: Your Honor, we don't read them
25 as conflating, we read them as two different things that

1 Congress was affording people who were designated as
2 alien enemies. One is the right to voluntarily depart
3 because if they're dangerous and they can't prove that
4 they're not then they could voluntarily depart. The
5 other is sort of an additional amount of time to
6 actually get your affairs together.

7 So we don't -- we don't read them
8 historically as linked. Certainly if Your Honor wanted
9 additional briefing, but we're not aware of any
10 authority for overriding the voluntarily departure
11 provision.

12 THE COURT: Have -- have any of the named
13 petitioners agreed to voluntarily depart the
14 United States?

15 MR. GELERT: They -- I don't think they've
16 been given -- well, I think one of them -- one of them
17 has. But what -- what it depends on, Your Honor, and
18 this is a critical point, is, under the immigration
19 laws, if they were to voluntarily be removed, they would
20 go back principally to the country from which they came.
21 In here, in this case, Venezuelans.

22 And if the government wanted to send them to
23 a third country, it would have to go through many
24 procedures, including making sure that they wouldn't be
25 tortured in that third country.

1 And certainly if the government was going to
2 send them to a foreign prison, directly to a foreign
3 prison, they would get CAT relief and couldn't be sent.
4 So I think the reason people are nervous if they were
5 given a chance is to make sure they know what country
6 they're going to be sent to. No one is going to say,
7 yes, I would like to voluntarily be removed to that
8 Salvadorian prison as a Venezuelan.

9 THE COURT: Thank you.

10 And, Mr. Velchik, so on this issue of
11 voluntary departure, the -- the response doesn't address
12 a couple of the decisions that the petitioners cite
13 in -- in their briefs that appear to state that
14 individuals must be permitted to voluntarily depart.
15 They're from the 2nd Circuit, not binding, persuasive
16 authority, but how do you distinguish them or contend
17 that their reasoning or construction of Section 21 is --
18 is not appropriate?

19 And a couple of examples that I just noted
20 here in my notes, I mean, the Ludwig decision, 1947,
21 that writes that the individual has the right of
22 voluntarily departure and only after his refusal or
23 neglect to leave may the government deport him.

24 The Hayman decision from '47, 2nd Circuit,
25 an individual in custody, this is the individual who was

1 detained in Costa Rica and then brought over to the
2 United States, challenged his removal I believe back to
3 Germany, that it writes it does not appear that this
4 relator has ever refused, or except because of his
5 internment, ever neglected to depart. His present
6 restraint by the respondent is unlawful insofar as it
7 interferes with his voluntary departure since the
8 enforced removal of which his present restraint is a
9 concomitant is unlawful before he does refuse or neglect
10 to depart.

11 Does the government contend that these
12 individuals, the named petitioners at least, have been
13 given the opportunity to voluntarily depart or how do
14 you distinguish these authorities?

15 MR. VELCHIK: Yes. With respect to the
16 three named plaintiffs here, we have no indication that
17 they intend to voluntary -- to -- to voluntarily depart.

18 THE COURT: But has the government offered
19 them that opportunity?

20 MR. VELCHIK: I think the government had to
21 arrest and apprehend them for crimes and for removal.

22 THE COURT: And upon -- upon detaining them,
23 was the opportunity to voluntary depart offered to them?

24 MR. VELCHIK: I don't have that information
25 before me, but we are -- are skeptical that the three

1 individuals here would voluntarily depart. We would --
2 we would want to make sure that they -- they did so, of
3 course.

4 THE COURT: And -- and is the government's
5 position that under the AEA the Executive Branch can
6 remove an individual to any other country or is it back
7 to -- should it be limited to the individual's native
8 country?

9 MR. VELCHIK: I think the Executive Branch
10 has discretion. I know that there are certain policies
11 that the Executive Branch tries to abide by, including
12 various conventions. I think traditionally the
13 Executive Branch has returned individuals to their home
14 country.

15 In this particular circumstance and other
16 circumstances implicating the Alien Enemies Act, I'm
17 sure that there may be sensitive diplomatic negotiations
18 that may be required to effectuate these removals and
19 that could affect the availability of -- of different
20 countries accepting individuals. I'm sure the Executive
21 Branch would retain the prerogative to have flexibility
22 in light of those diplomatic negotiations.

23 THE COURT: And -- and is it accurate that
24 the United States, the Executive Branch, has removed
25 individuals under the AEA and the proclamation to

1 El Salvador to be placed in CECOT?

2 MR. VELCHIK: I feel comfortable speaking
3 about the record in these three cases. (Unintelligible)
4 is ongoing litigation in other courts that are public
5 record.

6 THE COURT: Okay.

7 COURT REPORTER: I -- I'm sorry, I'm
8 comfortable -- repeat that.

9 MR. VELCHIK: Yes, ma'am.

10 I feel comfortable speaking to the record in
11 this case. I understand there's ongoing litigation
12 involving other individuals that are matters of public
13 record that this court can reference.

14 THE COURT: Does the -- does the -- do the
15 respondents believe that the Executive Branch has the
16 authority under the AEA to remove the named petitioners
17 directly to El Salvador to be placed in CECOT?

18 MR. VELCHIK: I believe the government does
19 not waive that prerogative.

20 THE COURT: So you -- so your position is
21 the President's --

22 MR. VELCHIK: I mean --

23 THE COURT: -- authority under the AEA does
24 include that -- that ability?

25 MR. VELCHIK: Yes.

1 THE COURT: Turning to the Convention
2 Against Torture, the -- the CAT, and -- and the INA.

3 Mr. Gelernt, a question for you:
4 Respondents in their response argue that
5 8 U.S.C. 1252(A)(iv) divests the court of jurisdiction
6 to review claims based on the CAT within a habeas
7 proceeding, right, which is what we have here.

8 There's the decision of Kapoor, the decision
9 of Mironescu, 4th Circuit decisions that -- that rely on
10 the broad language of 1254 -- 1252(A)(iv) to conclude
11 that an individual in habeas cannot present a challenge
12 based on the CAT.

13 I -- I didn't, reading the reply, did not
14 see or appreciate your attempt to distinguish those --
15 those decisions, in particular, Kapoor. You have an
16 individual who is under, if I remember correctly, a
17 certificate of extraditability is issued to be
18 extradited to India, challenges extradition to -- to
19 India in habeas, and as part of the challenge raises
20 that doing so would violate the Convention Against
21 Torture. The Kapoor decision denies jurisdiction over
22 that claim based on the broad language of
23 Section 1252(A)(iv).

24 How do you distinguish that -- that -- those
25 decisions of persuasive authority, not -- not binding on

1 this court, but aren't petitioners in this -- in these
2 habeas actions making the same type of challenge?

3 MR. GELERNT: So, as -- as far as I recall,
4 and I apologize, I'm not positive, I think those were
5 extradition cases.

6 THE COURT: Yes.

7 MR. GELERNT: So extradition has its own set
8 of rules that have always been there, but I think
9 there's authority going both ways.

10 But I want to say, outside of the
11 extradition context, CAT applies, CAT always applies.
12 And the decision I would suggest Your Honor look at is
13 Huisha-Huisha -- H-U-I-S-H-A dash H-U-I-S-H-A -- from
14 the D.C. circuit. There what the Supreme -- what the --
15 the government said is we're going to remove people
16 under the public health law, what was called title 42,
17 not under the INA. And, therefore, we don't think the
18 Convention Against Torture applies and we don't think
19 you can bring your claim in District Court.

20 And the D.C. circuit rejected that saying
21 the reason 1252(A)(iv) is there is if someone's going to
22 be removed under the immigration laws then the proper
23 way to raise their CAT claim is the normal way: You go
24 through the administrative proceedings and then you file
25 a petition for review directly from the Board

1 of Immigration, appeals to the Court of Appeals -- Board
2 of Immigration appeals to the relevant circuit Court of
3 Appeals. But where the government's operating outside
4 of the INA, you then have no way of following those
5 procedures, you have to be able to enforce the
6 Convention Against Torture, and you can bring it in
7 District Court. And that's a full analysis and I think
8 that's -- that's how we see this.

9 The government's suggesting we should do it
10 through a petition for review. How would we do that?
11 They are the ones who are circumventing the immigration
12 laws, they are taking people out immigration
13 proceedings. All these people have current immigration
14 proceedings, they're taking them out of immigration
15 proceedings where they were applying for asylum and CAT
16 and then putting them into this AEA process.

17 And then when they want to raise these CAT
18 claims, which they clearly have being sent to a
19 Salvadorean prison, they're saying, well, no, no, you
20 can't raise them now in District Court. So effectively
21 they're saying you can never raise the CAT claim.

22 There's no question -- and the government is
23 saying they're not going to talk about records in other
24 cases. I think obviously Your Honor knows if you turn
25 on the TV literally any second you know that there's

1 south Venezuelan men in that prison who the government
2 sent there and has said that's lawful. So they would
3 clearly have CAT claims and there's -- the government's
4 giving them no way to raise those because they're not
5 going to be in immigration proceedings and -- and being
6 able to go to the circuit by petition for review, which
7 is precisely what 1252(A)(iv) is about.

8 THE COURT: And the named petitioners in --
9 in this action, is it your representation that they have
10 made claims under the convention under Title 8 in -- in
11 their removal proceedings?

12 MR. GELERT: They all have made asylum
13 claims, I am fairly certain they have made Convention
14 Against Torture claims but I think one --

15 THE COURT: One Venezuela, I suspect.

16 MR. GELERT: Well, exactly, Your Honor, so
17 that -- that's the critical point is now all of a sudden
18 the rug's being pulled out from under them and they're
19 going to be sent to El Salvador. And, in a foreign
20 prison, well, of course, they would then make CAT
21 claims. There -- there's no way they won't be tortured
22 in that prison.

23 And I just want to correct one thing about
24 the three petitioners. One of them has an immigration
25 court, asked to take voluntary removal but to a country

1 that's not El Salvador and not in that prison.

2 THE COURT: Okay. All right. Thank you.

3 Let me turn to the class action issues. I
4 mean, effectively, based on the respondent's positions
5 as to the named petitioners, there's no need for a
6 preliminary injunction as to the named petitioners.
7 The -- the protections that the preliminary injunction
8 would afford, the government has stipulated to.

9 The same cannot be said for a class action.
10 The -- the proposed class action, which would include
11 individuals who are within the Southern District of
12 Texas and at some point in the future, or at least in
13 the past week or so, have been notified as being subject
14 to the proclamation and designated enemy aliens under
15 the proclamation and subject to removal under the AEA.

16 So just a couple of -- of questions. First
17 for Mr. Velchik, just to get an update, last hearing I
18 believe the government's position was that currently the
19 only individuals who were being detained in the Southern
20 District of Texas and who had previously been designated
21 as enemy aliens under the proclamation were the named
22 petitioners in this case and Mr. Zacarias in the other
23 litigation that's pending before me. Does that continue
24 to be true?

25 MR. VELCHIK: Yes, Your Honor, I'm aware of

1 four total.

2 THE COURT: And -- and are there other
3 individuals currently being detained in the Southern
4 District of Texas who since that last hearing have been
5 notified that they are enemy aliens under the
6 proclamation and subject to removal under the AEA?

7 MR. VELCHIK: The -- the latest numbers that
8 I have today are still four.

9 THE COURT: Okay. At some point, and I
10 believe this was in the J.G.G. litigation over in D.C.,
11 there was information that there were over a hundred
12 individuals within the Southern District of Texas who
13 had been designated as enemy aliens under the
14 proclamation and subject to removal under the AEA. That
15 number is now down to -- to four. It's unclear were
16 they transferred, were -- or removed, but they're no
17 longer in the Southern District of Texas.

18 But is there an estimate from the
19 respondents as to the number of Venezuelans over the age
20 of 14, not United States citizens or legal permanent
21 residents, who are currently detained in the Southern
22 District of Texas under Title 8?

23 MR. VELCHIK: I'm still only aware of four
24 subject to the alien removal act. In terms of any
25 individuals who meet those criteria of merely being

1 Venezuelan citizens, I don't have specific numbers, it
2 could be above that. But in terms of the AEA
3 individuals, four is the number that I have as of this
4 morning.

5 THE COURT: Correct. And I'm trying to
6 determine what's the potential class in the future. At
7 least, I mean, I -- we don't know whether the
8 United States will transfer individuals in the future
9 into the Southern District of Texas, but I'm just trying
10 to ascertain whether the United States knows if there
11 are other Venezuelan citizens who are being detained in
12 the Southern District of Texas over the age of 14 and
13 not legal permanent residents?

14 MR. VELCHIK: I don't have a specific number
15 four this morning on that class.

16 THE COURT: Let me, I guess, continue with
17 Mr. Velchik here. According to the Supreme Court's
18 decision in J.G.G., and this gets to class action
19 standing, the notice procedures, AEA detainees are
20 entitled to notice and opportunity to be heard
21 appropriate to the nature of the case.

22 Supreme Court required that AEA detainees be
23 given notice after the date of its decision that they
24 are subject to removal under the act. The notice must
25 be afforded within a reasonable time and in such a

1 manner as will allow them to actually seek habeas relief
2 in the proper venue before such removal occurs.

3 So that's our standard.

4 Purpose of the notice: Afford the
5 individuals the ability to actually seek habeas relief
6 in the proper venue.

7 Government takes the position 12 hours to
8 indicate an intent to file for a habeas action, followed
9 by 24 hours to actually file the action is -- is
10 sufficient.

11 As to the named plaintiffs, to the extent
12 that they challenge the sufficiency of the notice, they
13 run into an injury in fact problem because they have
14 sought habeas relief. And -- and so to the extent that
15 the notice was unreasonable, and -- and they weren't
16 under what -- what the government has now prepared or --
17 or adopted, but to the extent that the procedures used
18 as to the named plaintiffs, they -- they have no injury
19 to the extent that that was insufficient because they
20 were able to seek habeas relief which is the whole
21 purpose of the notice.

22 But from my perspective, there's a Catch-22
23 that may exist for the proposed class of individuals in
24 the Southern District of Texas who the United States
25 Government notifies in the future that they are enemy

1 aliens under the proclamation and subject to removal
2 under the AEA.

3 If the government gives an individual
4 notice, he files a habeas petition, that individual
5 can't challenge the reasonableness of the notice because
6 he was able to seek habeas relief.

7 If the government gives an individual notice
8 and she doesn't have time to file a petition, then the
9 government removes that individual precluding her from
10 filing for habeas relief and presenting the challenge to
11 the reasonableness of that notice.

12 How does an individual challenge the
13 reasonableness of the notice in habeas under these
14 circumstances?

15 MR. VELCHIK: Yes, Your Honor. I think it's
16 factually incorrect to suggest that it's impossible for
17 someone to raise those claims or to get judicial relief
18 because in fact this very thing has happened in
19 Colorado.

20 My understanding is that named plaintiffs
21 there were not subject to the Alien Enemies Act, they
22 alleged that there was an imminent risk that they could
23 be designated under the Alien Enemies Act, and therefore
24 applied for relief in a Federal District Court there
25 under habeas as the appropriate vehicle and received

1 judicial relief in a ruling earlier this week. So
2 certainly there's ongoing litigation where individuals
3 have been able to raise those notice claims.

4 THE COURT: But the government has opposed
5 those or does the government agree that that's an
6 appropriate vehicle?

7 MR. VELCHIK: I mean, the government
8 acknowledges the court's ruling in that case and so
9 certainly --

10 THE COURT: But you oppose that relief?
11 Did -- did the government not oppose that relief?

12 MR. VELCHIK: At the time, yes.

13 THE COURT: Does the government continue
14 to oppose that relief?

15 MR. VELCHIK: The government is appealing.

16 THE COURT: So I -- I take that as -- as an
17 opposition. In this case, can I reach the issue of the
18 reasonable -- reasonableness of the notice as to the
19 named plaintiffs?

20 MR. VELCHIK: I think the government agrees
21 with your first analysis that they do not have standing
22 or injury in fact in this case, and that continues to be
23 the government's position.

24 THE COURT: So is this not a circumstance
25 where class certification or a class-like multi-party

1 proceeding, the All Writs Act, would be appropriate to
2 allow the court to reach the legal issue of whether the
3 notice on the notice procedures satisfy the due process
4 requirements that the Supreme Court in J.G.G. recognizes
5 need to be given?

6 MR. VELCHIK: I understand where the court
7 is coming from, we would push back on -- on two items.
8 Number one, we still think that you would have to
9 satisfy requirements of Federal Rules of Civil Procedure
10 23(A). And it's not met for any number of reasons.

11 THE COURT: What about under the All Writs
12 Act?

13 MR. VELCHIK: Under the All Writs Act, you
14 know, we continue to think that you need at least one
15 individual who would have standing. To the extent that
16 the three named plaintiffs here do not have standing, it
17 would be inappropriate to form a class, provide
18 injunctive relief, and in particular provide injunctive
19 relief against the Executive Branch in an area involving
20 foreign diplomacy and national security would be --
21 would continue to be inappropriate, so we -- the
22 government opposes.

23 THE COURT: You might want to slow down just
24 a little bit for the court reporter.

25 MR. VELCHIK: My apologies.

1 COURT REPORTER: Thank you.

2 THE COURT: So if in these contexts the
3 future individual who ends up being detained in the
4 Southern District of Texas, notified that he or she is a
5 enemy alien under the proclamation and subject to
6 removal under the AEA, the -- the injury related to the
7 notice, procedures and the form that petitioners
8 challenge is in some sense transitory, right? It is --
9 it exists at the time that they're notified, they're --
10 they -- as they -- as they claim, right? They -- they
11 challenge the sufficiency of the time, they may
12 challenge, given that -- that the, we'll see, they may
13 challenge the sufficiency of the form and -- and what
14 the information that's included in the form.

15 But as soon as they file for habeas action,
16 then that -- whatever injury they -- that they -- they
17 had at that moment of being notified disappears because
18 now they've been able to file a habeas action.

19 And so, in that sense, it is transitory, it
20 exists but then disappears. Aren't there circumstances
21 similar to that where courts have said when the injury
22 can become moot or is transitory that class
23 certification is proper?

24 MR. VELCHIK: I'm not thinking of examples
25 that are on all fours with that and the -- the

1 government does not concede that it would be appropriate
2 to certify a class when individual named members don't
3 have standing. I'm not familiar with a precedence that
4 would support that.

5 THE COURT: Okay. I don't know if the
6 petitioners have a position on that point or to address
7 this issue of, at least what I'm referring to, as
8 potential Catch-22?

9 MR. GELERNT: I think you're absolutely
10 right, Your Honor. I mean, the implications of the
11 government's position is that, I mean, now the unsealed
12 declaration says 12 hours down from 24, but what if they
13 said one hour? We would never get into court, no one
14 would ever get into court to challenge that one-hour
15 notice.

16 So you're absolutely right, Your Honor, that
17 you have jurisdiction whether you use the All Writs Act
18 or habeas principles to reach this issue; otherwise,
19 potentially no one will ever get in.

20 And there's also the -- the notion that when
21 you have a class you can't continually moot the class by
22 saying we're going to give petitioners -- certain
23 petitioners relief and then moot the whole class.

24 And we obviously could put in another named
25 petitioner, but we don't need to given the principle

1 you've just outlined about how transitory it is.

2 THE COURT: And you -- you seek to certify
3 the class under Rule 23(B)(2) which applies when a
4 single injunction or declaratory judgment would provide
5 relief to each member of the class. I could conclude
6 that the President can invoke the AEA under the
7 proclamation, but still some members of the class would
8 not be entitled to ultimate relief because I could
9 determine that they are members of the TdA and -- and
10 subject to removal under the AEA.

11 Assume that that's a possibility, is it true
12 that the complained-of conduct is such that it can be
13 enjoined or declared unlawful only as to all class
14 members or as to none of them at all? It seems like it
15 would differ.

16 MR. GELERT: Right, Your Honor. So I -- I
17 think -- I think what -- how we would conceptualize it
18 is there are certain issues that go to everyone that if
19 Your Honor ruled in our favor would enjoin the removal
20 of anybody. And I think, you know, as we've been
21 talking about whether the proclamation is consistent
22 with the Alien Enemies Act is one of those. If
23 Your Honor were to determine that it wasn't consistent
24 with the Alien Enemies Act, then no would could be
25 removed under the Alien Enemies Act. Title 8 would

1 still be out there.

2 I think whether individuals have the right
3 to seek relief under the Convention Against Torture, at
4 least seek it, would, of course, go to everyone. And
5 also the notice is critical as to everyone, that
6 everyone needs to have that notice so they can get into
7 court.

8 Now if Your Honor were to rule against us
9 and say the court -- the President can use the Alien
10 Enemies Act in this context, it has given sufficient
11 notice, people are being screened for -- for relief
12 under the Convention Against Torture, but an individual
13 then wanted to say, well, I'm not even a gang member so
14 I don't fall within the proclamation, I think those
15 would proceed in individual habeases and I believe
16 Your Honor has one or two of those. So, at that point,
17 I think those -- those would not be a class -- those
18 issues would not be merged into the class and would be
19 dealt with separately.

20 But I think as what Your Honor was getting
21 at maybe initially in -- in converting this from a PI to
22 a summary judgment is those threshold issues, I think,
23 really need to be resolved; otherwise, we're going to be
24 in fire drills all over the country all the time. And
25 particularly, I think, in Texas where the government has

1 decided they're going to bring people.

2 Just if I could address your question about
3 people being moved into the -- the district, I mean, I
4 think that's what's happening is the government's moving
5 people from all over the country.

6 Your Honor had a TR -- the -- the
7 individuals who were originally here on March 15th are
8 now in El Salvador. I think that is public record now
9 and that we're fighting about that in the D.C. courts.
10 That -- that's separate.

11 But now Your Honor issued a TRO, people were
12 moved all over the country. Venezuelan men over the age
13 of 14 who the government alleges were TdA were moved
14 into the Northern District of Texas and now we're having
15 a fire drill.

16 I suspect if this court doesn't have
17 injunctive relief pending the outcome of its summary
18 judgment ruling, people will then be moved again into
19 the Southern District. So it's a very fluid situation,
20 I think that's been the problem.

21 THE COURT: Okay. Thank you.

22 A question about irreparable injury,
23 Mr. Velchik, you rely on -- on the, I think it's Nken
24 decision from the Supreme Court to argue that removal in
25 itself is not irreparable injury. It appears to me that

1 the key language in that decision is that Supreme Court
2 notes that the law had changed and that the abilities of
3 individuals had changed as a result under the law.

4 Under the new law that the court was
5 considering, as the court wrote, aliens who are removed
6 may continue to pursue their petitions for review and
7 those who prevail can be afforded effective relief by
8 facilitation of their return along with restoration of
9 the immigration status they had upon removal.

10 That's why removal was not categorically
11 irreparable injury. Can the same be said in the current
12 circumstances as to the AEA? If the government removes
13 one of the named petitioners under the AEA, can the
14 person challenge the removal in any manner?

15 MR. VELCHIK: My understanding is that's a
16 subject of ongoing litigation or diplomatic
17 communications in the 4th Circuit. I'm aware of that,
18 but I can't speak to that issue.

19 THE COURT: So you cannot guarantee that the
20 individual could be returned?

21 MR. VELCHIK: I can refer the court to the
22 4th Circuit's litigation.

23 THE COURT: I mean, this is -- you're here
24 representing the -- the government, and as to the named
25 petitioners, if they're removed under the AEA, can they

1 continue to seek relief in habeas in this action?

2 MR. VELCHIK: The government does not --

3 THE COURT: Or will they be able to?

4 MR. VELCHIK: -- the government does not
5 waive that -- that argument now.

6 THE COURT: Does not waive it, they would
7 not be able to because they're no longer being detained
8 here?

9 MR. VELCHIK: I think that would present
10 obstacles.

11 THE COURT: And if the individual ultimately
12 prevailed, is there a reasonable probability that the
13 person would be able to obtain relief by being returned
14 to the United States?

15 MR. VELCHIK: Again, I'm aware that there is
16 ongoing litigation about a particular issue raising some
17 of those concerns, I don't want to speak or implicate
18 those ongoing discussions.

19 THE COURT: Well, doesn't that distinguish
20 the Nken decision?

21 MR. VELCHIK: I acknowledge that analysis.
22 We -- we would emphasize that any harm that -- no
23 individual has a liberty interest in remaining in the
24 country illegally. Particularly if they've been here
25 for less than two years, there's a diminished liberty

1 interest that the Supreme Court recognized in
2 (unintelligible).

3 And certainly to the extent that irreparable
4 harm is being cause by the independent actions of
5 alleged third countries -- third parties in foreign
6 countries to which they may be transferred, I think that
7 that raises concerns, limitations in the irreparable --
8 irreparably harm analysis here.

9 THE COURT: Let me, a final question, I
10 think, for now to you, Mr. Velchik. We now have
11 Exhibit D, declaration of Mr. Cisneros describing the
12 procedures that the government has adopted regarding
13 notice under the AEA and the form that it will use to
14 provide notice. And -- and did the government submit a
15 similar declaration and form in Southern District of
16 New York, Northern District of Texas or the District of
17 Colorado?

18 MR. VELCHIK: I can't speak to all of that
19 litigation, I'm aware that -- I -- i believe similar
20 counsel in the Colorado case included in the record
21 similar copies of the form that they had provided that
22 had not come from the government. So it's a different
23 procedural posture, but I believe it was the same
24 document submitted.

25 At least in Colorado, I believe

1 representations were made to the court to the effect
2 that individuals would have at least 24 hours to file
3 for habeas relief.

4 THE COURT: And that was my follow-up
5 question, right, are the procedures at least in Colorado
6 described the same as what Mr. Cisneros describes in his
7 declaration? Is the form the same?

8 MR. VELCHIK: Yeah, I'm not aware of any
9 inconsistencies between the two.

10 THE COURT: Of any inconsistencies?

11 MR. VELCHIK: I'm not aware of any
12 inconsistencies between the two. Obviously it's the
13 government's position that those processes comport with
14 due process. And we would emphasize that certainly when
15 you compare it to other mechanisms of removal that
16 Congress has created, including expedited removal, which
17 allows for the removal of individuals within 24 hours
18 and no more than seven days, certainly by comparison to
19 that, we think that the Alien Enemies Act procedures, as
20 implemented by that memorandum, comport with due
21 process.

22 THE COURT: All right. Thank you.

23 I'm going to take a ten-minute recess and
24 then allow you, I may have a couple of follow-up
25 questions, but then will allow you ten minutes each.

1 You don't have to use it, but just want to give you the
2 opportunity if you think that there's a point that we
3 haven't addressed or -- or something you want to go back
4 to that I didn't give you a chance to finish your --
5 your answer. You have your ten minutes to use that time
6 as -- as you wish.

7 Question?

8 MR. GELERNT: Your Honor, you ruled that the
9 document should be unsealed, has that been unsealed yet?
10 I think -- all right.

11 THE COURT: Not -- not yet.

12 MR. GELERNT: Okay.

13 THE COURT: But at least in the hearing, we
14 can --

15 MR. GELERNT: Discuss it?

16 THE COURT: -- I mean, I referenced it.

17 MR. GELERNT: Right.

18 THE COURT: And -- and so essentially the --
19 the key, in terms of the procedures, is that the
20 document allows the individual upon being notified 12
21 hours to state an intent to file for a habeas petition.
22 If they do, and then if they do make that determination
23 or if at any point before they're removed they state an
24 intent to file for habeas petition, they have 24 hours
25 to file it. After those -- those time periods have

1 elapsed. The government will then proceed with removal,
2 although removal may not occur for days or -- or some
3 time.

4 MR. GELERNT: Yes. Thank you, Your Honor.

5 THE COURT: All right. Thank you. So we're
6 in recess.

7 (Court in short recess.)

8 THE COURT: You can be seated.

9 Just a couple of procedural matters before
10 we proceed with your -- your statements. First of all,
11 I find good cause to extend the current Temporary
12 Restraining Order through next Friday to facilitate the
13 court's consideration of the issues and allow for the
14 court to rule on those issues. I'll issue the written
15 TRO, but just to let you know that I will be extending
16 it through next Friday. Hope to rule before then.

17 It will not be as to the named plaintiffs,
18 but it will cover the punitive class to provide
19 protection, even though government's current position is
20 that there are no individuals within that class in the
21 Southern District of Texas but there could be some that
22 transferred into this district.

23 Second, we had -- I discussed the issue of
24 converting the Motion for Preliminary Injunction into a
25 motion for what effectively amounts partial summary

1 judgment because it doesn't reach all the issues; in
2 particular, for example, the issue of whether one of the
3 named petitioners is a -- a member of TdA. Obviously,
4 if I -- if I find certain ways on the arguments, then --
5 then the named petitioners would prevail, but -- but
6 they may not on those issues.

7 If I decline the -- the Motion for
8 Preliminary Injunction, that's appealable automatically.
9 Not so with a Motion for Summary Judgment. And so I
10 would have to certify it for interlocutory appeal under
11 28 U.S.C. 1292B. And -- and I'm certainly open to doing
12 so, but just want to give notice to the parties of my
13 intent to certify the ruling on the converted motion for
14 partial summary judgment for immediate interlocutory
15 appeal and want to give parties any issue at this point
16 or an opportunity at this point to object if they do so
17 object.

18 From the petitioner?

19 MR. GELERNT: No objection, Your Honor.

20 THE COURT: Respondents?

21 MR. VELCHIK: No objection, Your Honor.

22 THE COURT: Thank you. All right.

23 With that, those are the issues. So first
24 petitioners, you may make a statement if you wish.

25 MR. GELERNT: Your Honor, just a couple of

1 quick things. Your Honor, as leaving -- one of the
2 issues I was going to address was the danger to the
3 class in light of what happened in the Northern District
4 of Texas. Your Honor has addressed that by leaving a
5 TRO for the punitive class in place till Friday and
6 hopefully, whichever way you rule, it'll give them
7 protection. Because I think, absent protection, we'll
8 have a situation like we did in the Northern District of
9 Texas where the Judge -- they didn't give precise
10 representations as to the class. A few hours later,
11 they were all getting notice and were on buses. So
12 however Your Honor rules.

13 I -- I want to just on the merits of whether
14 the proclamation's consistent with the TdA, I mean with
15 the AEA. If Your Honor finds that it needs to be a
16 military invasion or incursion, which we hope that
17 Your Honor will, I don't think you need to reach the
18 foreign government question. You could assume that away
19 or you could decide it however you want, but that would
20 be sufficient to say that the proclamation is
21 inconsistent with the AEA.

22 And just on to the government's point about
23 incursion or invasion, those were -- are obviously
24 military steps toward an invasion, the French were
25 shooting at the U.S. during that time. And an incursion

1 is more limited military, the invasion is actually
2 coming onto U.S. territory and invading with, you know,
3 forces in a -- in a more significant way. And then,
4 obviously, Congress always has the choice to -- to
5 declare a war.

6 Just on the foreign government point,
7 Your Honor, I think if you look at the proclamation on
8 where they're saying that TdA is intertwined with, they
9 stop short. It's a very carefully phrased proclamation,
10 they stop short of actually saying they are the
11 government or Maduro is directing the government --
12 directing TdA as part of the government. And I think
13 that's all Your Honor actually needs to understand is
14 that it's too carefully written to actually say TdA is
15 part of the Venezuelan government.

16 The only other thing I would say about that
17 is the government made a point of, well, what happens in
18 the future if -- of course Your Honor's opinion is about
19 this proclamation at this time. If TdA actually became
20 the Venezuelan government and was invading us, of course
21 Your Honor's opinion wouldn't cover that.

22 If some other gang is -- is invoked under
23 the AEA and there were different -- a different
24 proclamation, of course. So -- so that's -- I think all
25 those issues are -- are not really relevant.

1 The main point I would just keep stressing
2 is within the four corners of the proclamation, it's
3 very carefully written. And if you note, the sworn
4 declarations do not actually saying that Maduro is
5 directing TdA as part of the government or that TdA is
6 the government or that they're actually using military
7 means. That this is a criminal organization, and on
8 that I would look at the Smith declaration.

9 The other two points where we think summary
10 judgment is clearly warranted is the notice is
11 insufficient. 12 hours, now that the government has
12 reduced it from 24 hours to 12 hours, even 12 -- 24
13 hours wasn't sufficient, 12 hours is clearly not
14 sufficient.

15 And I also think Your Honor could hold at
16 this point that people need to be screened for CAT. If
17 they're going to be sent to El Salvador to a prison,
18 that's very different than deportation. Not only is it
19 being sent to a foreign country, a third country, but
20 it's being sent directly to a prison where they may
21 never get out of.

22 I think the government has pointed to the
23 4th Circuit's case, Abrego-Garcia, I think the court
24 probably is aware that the government is taking the
25 position, including in the Supreme Court, that once

1 someone's in that prison, the government has no
2 obligation to get them out and that they could be there
3 for the -- for the rest their lives as the Salvadorian
4 prison -- President has said.

5 And so the only other thing I would just say
6 is, with respect to the -- I -- I think I would just
7 re-emphasize your point that of the transitional nature
8 of this, the government can't have a situation where the
9 notice is so short, take the named plaintiffs off the
10 board and then say, well, the court can never reach the
11 notice issue for anybody else because this will just
12 keep happening.

13 So unless the court has further questions, I
14 will end there and just say that I think if the
15 proclamation is upheld on the AEA, that's going to be
16 a -- really going to have staggering implications that
17 the President could name literally any entity. And if
18 they can't -- if the courts can't review that or if any
19 kind of conclusory sentence is sufficient, you literally
20 could have anybody being sent to a Salvadorean prison or
21 some other prison in the -- in -- somewhere else in the
22 world. So I think the court should resist the
23 government's position on that.

24 Thank you, Your Honor.

25 THE COURT: Thank you.

1 Mr. Velchik?

2 MR. VELCHIK: Nothing further from the
3 government, Your Honor.

4 THE COURT: Thank you. So thank you for
5 your arguments here this afternoon. So I am taking the
6 pending motions under consideration. You are excused
7 and so we're adjourned.

8 MR. GELERNT: Thank you, Your Honor.

9

10 REPORTER'S CERTIFICATE

11

12 I certify that the foregoing is a correct transcript
13 from the record of proceedings in the above-entitled
14 matter.

15

16

17

/s/ Sheila E. Heinz Perales
SHEILA E. HEINZ-PERALES
CSR RPR CRR

18

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Exhibit 2

Exhibit B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

J.A.V., et al.,

Petitioner.

v.

DONALD J. TRUMP, et al.,

Respondents.

Civil Action No. 1:25-cv-072

DECLARATION OF ASSISTANT FIELD OFFICE DIRECTOR

Pursuant to the authority of 28 U.S.C. § 1746, I, Carlos D. Cisneros, an Assistant Field Office Director for U.S. Department of Homeland Security (DHS), United States Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO), Harlingen, Texas (TX) declare as follows:

1. I am an Assistant Field Office Director (“AFOD”) for U.S. Department of Homeland Security, United States Immigration and Customs Enforcement, Enforcement and Removal Operations (“ICE ERO Harlingen”). I began my employment with ICE (Legacy Immigration and Naturalization Service) on January 18, 2000, and I have been serving as the AFOD for ICE ERO Harlingen since August 28, 2022.
2. In my role as AFOD, I oversee ERO enforcement operations for the Harlingen Office. As an AFOD, I am responsible for the supervision of deportation officers managing detained cases in Harlingen, Texas. I am also responsible for overseeing the safety, security and care of individuals in my custody.
3. While preparing this declaration, I have examined the official records available to me regarding the Alien Enemies Act (AEA) notice procedure. I submit this declaration to outline

the notice procedure and to inform the court about why a description of the procedure should be kept under seal.

A. The Notice

4. Attached as an exhibit to this declaration is a copy of Form AEA-21B, which ICE officers serve on aliens whom the Agency intends to detain or remove pursuant to the AEA.

5. ICE acknowledges that the Form AEA-21B is written in the English language; however, this does not mean that aliens do not receive the process due them. ICE officers are accustomed to working with aliens who do not understand English.

6. Through an ICE-wide contract with a language assistance vendor (i.e. language lines), ICE uses professional oral interpretation and translation services that cover more than 200 languages, including rare and Indigenous languages. Enforcement and Removal Operations (ERO) serves as the Contracting Officer Representative for this ICE-wide language services contract. Centralizing oversight over the contract allows better coordination with the vendor and the establishment of processes for obtaining regular reports. Additionally, many ERO staff have sufficient proficiency in one or more languages other than English and communicate with limited English proficiency (LEP) persons in their primary language when appropriate.

7. Pursuant to ICE detention standards, oral interpretation or assistance is provided to any detained alien who is illiterate or who speaks another language in which written material has not been translated.

8. The various ICE Detention Standards under which detention facilities operate require that information be provided to LEP persons in a language or manner they can understand throughout the detention process to provide them with meaningful access to programs and services. This may be accomplished through use of bilingual staff or professional interpretation and translation services. Depending on the type of facility and contract specifications, the contractor may have and use their own dedicated language line.

B. Habeas Components to the Process

9. The alien is served individually with a copy of the Notice, Form AEA 21-B, the notice is read to the alien in a language that he or she understands.

10. As part of the notice procedure, the alien is informed that he or she can make a telephone call to whomever he or she desires, including legal representatives. ICE ensures that telephones are made available for the aliens and that the aliens have access to the telephone lines.

11. Generally, the alien is provided at least 12 hours after receiving the AEA notice, including the ability to make a telephone call, before he or she is placed on a plane for removal. In general, if after 12 hours, the alien has not expressed any intent to file a habeas petition, removal can proceed. Otherwise, if the alien expresses an intent to file a habeas petition, ICE will allow 24 hours after the alien makes this selection, to file a habeas petition before proceeding with removal.

12. ICE will not remove an alien under the AEA, even if a Temporary Restraining Order is not yet entered, until the habeas petition is resolved.

C. Justification for Sealing the Description of the Notice Procedure

13. The internal notice procedure outlined in this declaration should be filed and remain under seal because this process is law enforcement sensitive. In this circumstance, revealing our notice procedure would disclose to the public guidelines that are integral to conducting law enforcement investigations and could risk circumvention of the law.

Signed this _____ day of April 2025.

**CARLOS D
CISNEROS JR**  Digitally signed by
CARLOS D CISNEROS JR
Date: 2025.04.22
20:58:47 -05'00'

Carlos D. Cisneros
Assistant Field Office Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**NOTICE AND WARRANT OF APPREHENSION AND REMOVAL
UNDER THE ALIEN ENEMIES ACT**

A-File No: _____ Date: _____

In the Matter of: _____

Date of Birth: _____ Sex: Male Female

Warrant of Apprehension and Removal

To any authorized law enforcement officer:

The President has found that Tren de Aragua is perpetrating, attempting, or threatening an invasion or predatory incursion against the territory of the United States, and that Tren de Aragua members are thus Alien Enemies removable under Title 50, United States Code, Section 21.

_____ has been determined to be: (1) at least fourteen years of
(Full Name of Alien Enemy)
age; (2) not a citizen or lawful permanent resident of the United States; (3) a citizen of Venezuela; and (4) a member of Tren de Aragua. Accordingly, he or she has been determined to be an Alien Enemy and, under Title 50, United States Code, Section 21, he or she shall be apprehended, restrained, and removed from the United States pursuant to this Warrant of Apprehension and Removal.

Signature of Supervisory Officer: _____

Title of Officer: _____ **Date:** _____

Notice to Alien Enemy

I am a law enforcement officer authorized to apprehend, restrain, and remove Alien Enemies. You have been determined to be at least fourteen years of age; not a citizen or lawful permanent resident of the United States; a citizen of Venezuela; and a member of Tren de Aragua. Accordingly, under the Alien Enemies Act, you have been determined to be an Alien Enemy subject to apprehension, restraint, and removal from the United States. Until you are removed from the United States, you will be detained under Title 50, United States Code, Section 21. Any statement you make now or while you are in custody may be used against you in any administrative or criminal proceeding. This is not a removal under the Immigration and Nationality Act. If you desire to make a phone call, you will be permitted to do so.

After being removed from the United States, you must request and obtain permission from the Secretary of Homeland Security to enter or attempt to enter the United States at any time. Should you enter or attempt to enter the United States without receiving such permission, you will be subject to immediate removal and may be subject to criminal prosecution and imprisonment.

Signature of alien: _____ Date: _____

CERTIFICATE OF SERVICE

I personally served a copy of this Notice and Warrant upon the above-named person on _____
and ensured it was read to this person in a language he or she understands. (Date)

Name of officer/agent

Signature of officer/agent