

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.G.G., et al.,

Plaintiff(s),

v.

DONALD J. TRUMP, et al.,

Defendant(s).

Civil Case

No. 25-00766 JEB

Washington, D.C.

March 15, 2025

MOTION HEARING HELD VIA ZOOM
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT CHIEF JUDGE

APPEARANCES:

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1 The following proceedings began at 5:00 p.m.:

2 THE COURTROOM DEPUTY: We are here today for a motion
3 hearing in Civil Action 25-766, JGG, et al. versus President
4 Donald Trump, et al.

5 Beginning with counsel for the plaintiff, please
6 state your name for the record.

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

9 THE COURT: Good afternoon.

10 MR. GALINDO: Good afternoon, Your Honor. Daniel
11 Galindo for the plaintiffs from the ACLU.

12 THE COURT: Thank you.

13 MS. PERRYMAN: Good afternoon, Your Honor. Skye
14 Perryman for the plaintiffs from Democracy Forward
15 Foundation.

16 THE COURT: Welcome.

17 MR. TRIVEDI: Somil Trivedi from the Democracy
18 Forward Foundation for the plaintiffs.

19 THE COURT: Thank you.

20 MS. RICH: Good afternoon, Your Honor. Sarah Rich
21 for the plaintiffs, also from Democracy Forward Foundation.

22 THE COURT: Thank you. Nice to see all of you.

23 THE COURTROOM DEPUTY: Okay. And defense?

24 MR. ENSIGN: Good afternoon, Your Honor. Drew Ensign
25 for the federal defendants.

1 THE COURT: Thanks, Mr. Ensign.

2 Okay. So first, apologies for my attire. I went
3 away for the weekend and brought with me neither a robe nor
4 tie nor appropriate shirt, so thank you all for being
5 appropriately attired and hope you will forgive my casual
6 ones.

7 Thanks also for everybody's availability on such
8 short notice. Again, I only learned of this case first
9 thing this morning, and I know everybody has been working
10 hard to get up to speed on it since that time.

11 So I have a few -- just a couple preliminary points
12 and questions, and then we will move forward.

13 So the first is I was told first thing this morning
14 that at least one of the named plaintiffs was at that point
15 being placed on a plane or imminently being placed on a
16 plane to be deported, and my ruling this morning was,
17 because I was not aware of the issuance of any proclamation
18 and I don't think one had been issued at the time I ruled,
19 my ruling was based on my belief that under the INA, there
20 was no authority to immediately deport folks who were named
21 plaintiffs.

22 So my ruling was not a preventive ruling related to
23 the AEA because I didn't believe it had been -- there had
24 been a proclamation at that time. I now see that there has
25 been a proclamation issued.

1 Mr. Ensign, do you have a time of day that that was
2 issued you can put on the record?

3 MR. ENSIGN: I do not, Your Honor. We are happy to
4 look into that and get back to you. I know it was just put
5 on the presidential website about an hour ago.

6 THE COURT: But fair to say this afternoon?

7 MR. ENSIGN: Your Honor, I don't know the answer to
8 that question.

9 THE COURT: Okay.

10 MR. GELERNT: Your Honor, I apologize for
11 interrupting. This is Mr. Gelernt. My understanding from
12 the proclamation is that it was signed yesterday. It may
13 not have been made public until today, but that it was
14 signed and, I guess, kept secret until today.

15 THE COURT: It's an interesting question of when it
16 is effective if it's not published. Thank you for that.
17 But just making clear that my ruling was INA-based this
18 morning.

19 Okay. The second question which I think the
20 plaintiffs have raised in alerting my chambers to the
21 proclamation is that they expected planes to be departing
22 within the last couple of hours.

23 And so I will ask you, Mr. Ensign, if any of the
24 named plaintiffs are, in fact, on any plane that has
25 departed?

1 MR. ENSIGN: Your Honor, we have confirmed with the
2 defendants that removal to Guantanamo Bay had been initiated
3 under the AEA, later changed to El Salvador. However, these
4 five named plaintiffs subject to the TRO will not be removed
5 during that 14-day period.

6 THE COURT: Okay. But then I would assume that means
7 that they are either not on the planes or that they will not
8 be removed from the planes and will be brought back once the
9 planes land in El Salvador. Is that fair?

10 MR. ENSIGN: Your Honor, I don't know the status of
11 the planes. If there are removal flights, the five would not
12 be on them.

13 THE COURT: Okay. I'm sorry. Was it not six,
14 Mr. Gelernt?

15 MR. GELERNT: It was five, Your Honor.

16 THE COURT: Sorry. Okay. All right. So thank you,
17 Mr. Ensign.

18 And I also understand just from looking at the docket
19 that the government has appealed my TRO ruling. And that's
20 obviously your right, Mr. Ensign. So I won't go into,
21 because I don't think I have jurisdiction given the appeal,
22 to reargue the TRO ruling, but what we will just look at
23 today is the class question. And then if I do, in fact,
24 certify provisionally, then we can talk.

25 I think what that would likely mean is that the

1 plaintiffs could then seek a TRO on behalf of a
2 certified class, and then we can talk about how we want to
3 go from there. I think we are having an echo.

4 THE COURTROOM DEPUTY: It is. I am having difficulty
5 with the public line. It may be too many people on here.
6 I'll keep it as long as I can, Your Honor.

7 THE COURT: Okay. Thank you.

8 So let me ask the government then what your position
9 is regarding the class issue only.

10 MR. ENSIGN: Your Honor, we oppose class
11 certification. The principal reason is one of venue and
12 authority. Under -- I think we are getting the echo again.

13 THE COURT: We are, but let's try to go ahead, and as
14 annoying as it is, let's see if we can push through with the
15 echo.

16 MR. ENSIGN: Thank you, Your Honor. Will do.

17 These are claims that plaintiffs have brought that
18 fundamentally sound in habeas. When the supreme court
19 considered the last AEA case in Ludecke versus Watkins, 355
20 U.S. 160, these were all considered within the scope of
21 habeas. And because this is a habeas case, because it
22 sounds in habeas and because plaintiffs have specifically
23 included a habeas claim, I believe it's Count 9 of their
24 complaint, then the venue rules of habeas apply.

25 Under the supreme court decision in Rumsfeld v.

1 Padilla, venue was only appropriate for a habeas case solely
2 in the location where the person is being detained or where
3 (unintelligible), and so because of that --

4 (There was an interruption by the court reporter.)

5 THE COURT: Sorry, Tammy, the court reporter.

6 I think when there's an echo, I think you might have
7 to sort of proceed sentence by sentence and pause and let
8 the echo go through and then continue.

9 And, Tammy, we'll hope that will be satisfactory.

10 So, Mr. Ensign, again, the issue is venue. You are
11 saying that it must be brought where the warden or the --
12 typically prisoner cases, it's the warden, but here, whoever
13 is actually detaining the plaintiffs. Is that correct?

14 MR. ENSIGN: That's correct, Your Honor. In
15 addition, this Court has recognized, and I believe Your
16 Honor in the Vetre versus Sessions case, which is
17 316 F. Supp. 70, that when habeas is available, then that is
18 an -- that's an adequate alternative remedy that precludes
19 APA claims under Section 702, and so all the claims would
20 have to be considered under habeas.

21 And because of that, you know, to the extent that
22 there could ever be a class, it could only be solely within
23 a single judicial district of people there. And of course,
24 it would still have to satisfy all the other requirements of
25 classes, but certainly that venue issue precludes this Court

1 certifying a nationwide class.

2 THE COURT: Okay. Thank you very much.

3 Mr. Gelernt, can you respond to the venue question?

4 MR. GELERNT: Sure, Your Honor. I think initially --
5 I guess I don't have an echo, so I can continue.

6 Initially we have -- we think this conflates the
7 merits. And you know, you issued a TRO. You found you had
8 jurisdiction to issue a TRO. So we think that's sufficient
9 at this point. I think we are veering pretty far into the
10 merits.

11 But just taking it on those terms, for one thing, we
12 filed both a habeas and APA 1331. And you can challenge the
13 Enemy Aliens Act without habeas. There are cases like Clark
14 that do that. But also, for habeas, I would also say that
15 the immediate custodian rule does not apply because this is
16 not core habeas asking for relief. It's to stop the
17 transfer and challenge the constitutionality.

18 So both because we haven non-habeas funds of
19 jurisdiction and because the immediate custodian rule
20 doesn't immediately apply in this case, I think that's more
21 than sufficient for this Court to proceed.

22 THE COURT: So, Mr. Ensign, Mr. Gelernt is right that
23 they are not seeking release, so tell me why you think your
24 venue argument is still appropriate.

25 MR. ENSIGN: Your Honor, because these claims

1 inherently sound in habeas. Plaintiffs recognize that
2 themselves by bringing a habeas case. The supreme court
3 itself has recognized that it's appropriate to consider this
4 in habeas when it did so in the Ludecke case.

5 And where habeas applies, it displaces a lot of other
6 law including specifically the APA, as this court found in
7 the Vetre case. It also displaces even statutory causes of
8 action. You know, Heck v. Humphrey, for example, even
9 though you would otherwise have a 1983 suit for most
10 constitutional claims, the second they sound in habeas,
11 habeas, you know, cuts off 1983 entirely and forces you to
12 go through the route of habeas.

13 And so the habeas rule has some real teeth and is
14 ultimately an attack on the authority of wardens to turn
15 people over, you know, to be removed, and they would -- I
16 mean, what they are seeking ultimately is the equivalent to
17 telling the immigration, equivalent to a warden, you may not
18 release these people to be removed from the country.

19 THE COURT: Isn't that the exact opposite of habeas
20 where you just said you are ordering them you may not be
21 released as opposed to habeas which is you must be released,
22 right?

23 MR. ENSIGN: Your Honor, it is -- in this
24 application, it is a little odd, but certainly the way the
25 supreme court has considered it previously, like,

1 specifically challenges to the AEA sounded in habeas. And
2 that was an utterly uncontroversial aspect of the Ludecke
3 decision. Even though it was five-four about, you know, the
4 intricacies of the AEA, it nonetheless was uncontroversial
5 there that this was properly heard as a habeas claim.

6 THE COURT: Do you want to respond to that,
7 Mr. Gelernt?

8 MR. GELERNT: Your Honor, I would just say that the
9 fact that some cases can be brought in habeas certainly
10 doesn't preclude them being brought under 1331 and the APA
11 and this court. And Your Honor has opinions along those
12 lines with detainees outside of the district in Damus and I
13 think Heredia Mons as well.

14 As Your Honor said, this is not a core habeas. We
15 certainly can proceed in habeas in this district, but we
16 don't need to proceed in habeas. We are not aware of any
17 case that says we cannot challenge the Alien Enemies Act on
18 non-habeas grounds.

19 THE COURT: All right. Well, this is obviously an
20 issue that has not been briefed.

21 I should have said earlier at the beginning of the
22 hearing, although it is implicit, that there is no
23 broadcasting or recording of this hearing, and I am being
24 informed that it is, in fact, being broadcast by a certain
25 individual. That's in violation of the court's rules. That

1 can be punishable by contempt. You may not broadcast or
2 record any court proceedings. And further -- I am getting
3 further information we will shut down the public line.

4 THE COURTROOM DEPUTY: Your Honor, I did make that
5 statement.

6 THE COURT: Thank you.

7 THE COURTROOM DEPUTY: You're welcome.

8 THE COURT: So I think it would be very helpful for
9 me to get some expedited briefing on this. And I know that
10 given the circumstances, the plaintiffs are justifiably
11 concerned about imminent deportation.

12 Can you tell us, Mr. Ensign, are imminent
13 deportations and removals under this proclamation planned?
14 When I say imminent, I mean in the next 24 or 48 hours.

15 MR. ENSIGN: Your Honor, I don't know the answer to
16 that question. We can certainly investigate that and report
17 that back to you. But I don't know that -- the answer to
18 that. I know what plaintiffs have said to the clerk's
19 office. I don't yet know -- have an ability to confirm that
20 or, you know, contest that.

21 THE COURT: Okay. So how soon can you get that
22 information?

23 MR. ENSIGN: Your Honor, I can certainly talk to them
24 ASAP and see. You know, it is Saturday. I will try to get
25 people as quickly as possible and find out that information.

1 You know, I think we were certainly planning on opposing the
2 TRO by tomorrow night in advance of the hearing on Monday if
3 that's still going forward. We can certainly include it in
4 that filing if that works.

5 THE COURT: So, Mr. Gelernt, do you want to propose a
6 schedule for me? I think I would like the -- we should
7 probably have the government first respond saying there
8 is -- arguing just on the venue issue of class
9 certification, and then you can respond to that and I would
10 rule quickly.

11 MR. GELERT: Your Honor, a couple of things. One is
12 that I recognize it's Saturday, but on the other hand, the
13 government appears to be moving planes very rapidly to
14 El Salvador with hundreds of people. So we hope that in the
15 next five minutes, counsel for the government can get an
16 answer to that.

17 Our understanding from people on the ground, from
18 different sources, is that planes are going right now taking
19 Venezuelans to El Salvador and may be ending up in a
20 Salvadoran prison. Not only will that divest this Court of
21 jurisdiction, but I think those people are in real trouble,
22 Venezuelans put into a Salvadoran prison.

23 So we had two flights that we believe were scheduled
24 for this afternoon that may have already taken off or during
25 this hearing, so I think in the next five minutes.

1 And we would further ask Your Honor that you issue a
2 class-wide TRO pending the briefing, and we will be prepared
3 to get the venue briefing in as soon as the government can
4 do it and you would like. But I think there is so much
5 urgency here and there is so much harm at stake and this
6 Court's jurisdiction is at stake.

7 And just one clarification, Your Honor, we don't
8 believe we would need to amend the TRO because the TRO did
9 ask for a class-wide TRO. The complaint was a class
10 complaint. We have class papers, and the TRO was seeking a
11 class TRO.

12 So we would respectfully urge this Court to issue a
13 class TRO now to avoid any more harm and then brief the
14 venue as fast as the government would like. And we would
15 respond in eight hours or so or ten hours or whatever the
16 Court thinks is appropriate.

17 THE COURT: I think it would probably be helpful if
18 we adjourned this hearing briefly and let Mr. Ensign do some
19 digging and then returned and talked about this further. So
20 why don't we -- can we adjourn this hearing until
21 6:00 Eastern Time, at which time, Mr. Ensign, I will want to
22 know, have planes, in fact -- is deportation of people under
23 the proclamation pursuant to the AEA in motion now and will
24 it be for the next 48 hours, because that would require a
25 more immediate decision. All right, Mr. Ensign?

1 MR. ENSIGN: We can do that, Your Honor. I mean,
2 briefly on the irreparable harm point, as the supreme court
3 said in Nken, Although removal is a serious burden for many
4 aliens, it's not categorically irreparable as some courts
5 have said. It is accordingly plain that the burden of
6 removal alone cannot constitute the requisite irreparable
7 injury.

8 THE COURT: I think they have made out more than just
9 removal. I think they have made out the harm that will
10 befall the individual plaintiffs upon removal.

11 So what we will do is we will adjourn the hearing
12 until 6:00 p.m. Eastern Time. We will resume the hearing at
13 that point and get information from Mr. Ensign, and then I
14 will also try to have a better sense of whether I am
15 prepared to -- again, it could be issuing a separate TRO
16 covering this provisional class or not.

17 Okay. Any objection to that, Mr. Gelernt?

18 MR. GELERNT: No, Your Honor. Thank you.

19 THE COURT: Good.

20 Mr. Ensign?

21 MR. ENSIGN: No, Your Honor. We will proceed as you
22 instruct.

23 THE COURT: Okay. See everybody in 38 minutes.
24 Thanks.

25 THE COURTROOM DEPUTY: This honorable court is

1 adjourned until 6:00 p.m.

2 (The hearing adjourned at 5:22 p.m.)

3 THE COURT: Thanks, Nikki.

4 Welcome back, everybody. I don't think we need to
5 have everyone identify themselves again. I've got the same
6 counsel present.

7 Mr. Ensign, let's hear your report.

8 MR. ENSIGN: Your Honor, unfortunately I don't have
9 many details to share. I have talked to the clients who let
10 me know the sort of operational details as to what is going
11 on with raised potential national security issues,
12 particularly ones if discussed with a public line. So I do
13 not have additional details I can provide at this time.

14 They raised that we may be able to provide Your Honor
15 additional details in an in camera hearing if we were to --

16 THE COURT: Fine. Maybe what we should do -- Nikki,
17 can we either disconnect the public line, or can you put us
18 in breakout rooms? Can we disconnect and then reconnect the
19 public line, or can we go into a breakout room?

20 THE COURTROOM DEPUTY: I can just remove the public
21 line right now.

22 THE COURT: And then can you reinstate it?

23 THE COURTROOM DEPUTY: I believe so. If it
24 disconnects, I can call it without interrupting as well.
25 It's different than the courtroom.

1 THE COURT: Okay. So we are going to disconnect the
2 public line for this in camera proceeding, and then we will
3 come back.

4 (The public line was disconnected.)

5 THE COURT: Okay. The public line is
6 disconnected. Mr. Ensign.

7 MR. ENSIGN: Your Honor, I am still trying to get
8 additional details. I don't -- we would have to sort out
9 what can still be provided in camera. They suggested that
10 as a way to potentially provide some details, but I do not
11 personally have those right now.

12 THE COURT: So you have no details for us in camera?

13 MR. ENSIGN: Not at this time, Your Honor. We would
14 have to figure out what could be provided in camera.

15 THE COURT: Okay. Well, when is that going to be
16 determined?

17 MR. ENSIGN: I don't know. I have been trying to get
18 those details, and I don't presently know when I would be
19 able to get that. I'm certainly trying to get that
20 information, but that is not something, the details, that I
21 know.

22 MR. GELERNT: Your Honor, I'm sorry.

23 THE COURT: Sure. Go ahead.

24 MR. GELERNT: Your Honor, what we understand is that
25 two flights went to El Salvador this afternoon, one very

1 recently, and there's another one, we are not sure where
2 it's scheduled to go exactly. It may be Honduras. We are
3 not sure. But it's supposed to leave at 6:23.

4 THE COURT: All right. Let's reconnect the public
5 line.

6 THE COURT REPORTER: Your Honor, is the in camera
7 portion of the hearing under seal?

8 THE COURT: I trust not, Mr. Ensign, since we didn't
9 hear anything. Any reason we need to put that under seal,
10 Mr. Ensign?

11 MR. ENSIGN: No objection, Your Honor.

12 THE COURT: Okay. So no, Tammy.

13 (The public line was reconnected.)

14 THE COURT: All right. It looks like it's -- is it
15 back up, Nikki?

16 THE COURTROOM DEPUTY: Yes, Your Honor.

17 THE COURT: Okay. So for the public, there were no
18 representations that were able to be made in our private
19 session, so the public has not missed anything.

20 All right. So, Mr. Gelernt, why don't you just
21 repeat your statement.

22 MR. GELERNT: We understand that two flights went to
23 El Salvador this afternoon; one very recently, and then
24 another flight is scheduled for 6:23, we believe, to
25 Honduras, but we are not entirely sure. And the flight

1 destinations have changed for these past two flights. But
2 we believe it's scheduled for 6:23, so only in a matter of
3 minutes.

4 THE COURT: So, Mr. Ensign, you can't -- can you
5 confirm that people -- you can't even confirm -- well, I
6 guess on the public line, you're not -- and actually
7 couldn't make any representations even privately what's
8 happening with any flights.

9 So let me just go over then a few issues that we
10 discussed earlier. So the first is the people who would be
11 subject to be certified as a class and then further
12 requested TRO, Mr. Gelernt, they are, as you believe, all
13 currently held under INA?

14 MR. GELERNT: They are all in proceedings as far as
15 we understand, and so what the government apparently is
16 doing is using the Alien Enemies Act to circumvent the
17 immigration laws and to remove them before they actually
18 have a final order. That's the case with the five
19 plaintiffs, and that's what we understand to be happening
20 around the country.

21 THE COURT: Right, but what I'm trying to look at is
22 the venue and habeas question.

23 MR. GELERNT: Right.

24 THE COURT: And so I guess -- it seems that you are
25 not seeking to challenge the fact or duration of their

1 confinement. Is that true?

2 MR. GELERNT: That's absolutely right, Your Honor.
3 And I think that's the critical distinction here, that it's
4 not a core habeas challenging release. They are not trying
5 to get out of detention in this lawsuit. They are going to
6 be held in detention presumably unless they have some
7 individual basis under the INA to get out. This lawsuit
8 will not allow them to be released, but it will stop their
9 removal hopefully under the Alien Enemies Act so they can
10 continue their proceedings under the immigration law. So
11 it's absolutely not a core habeas.

12 THE COURT: So --

13 MR. GELERNT: I apologize, Your Honor. I was just
14 going to add the point --

15 THE COURT: Go ahead.

16 MR. GELERNT: -- even if it could be brought in
17 habeas, that doesn't mean it has to be. So your decision in
18 RILR makes that point, Araceli. There's a number of cases
19 in this district. You made the point very clearly in your
20 IRLR decision that even if it could be brought in habeas, it
21 doesn't have to be.

22 THE COURT: Mr. Ensign, why do you think then that
23 they are challenging the fact or duration of confinement?

24 MR. ENSIGN: Your Honor, I think that this sounds in
25 habeas for several reasons. I think one is that because the

1 AEA vests all its authority, relevant authority, with the
2 president himself and the APA can't be used to challenge
3 presidential actions, the only claims that we are left with
4 here are habeas claims.

5 We think the supreme court's decision in the 1948
6 case in Ludecke also indicates that this is a habeas case.
7 And it's ultimately challenging, you know, the exercise of
8 the authority over their person under the AEA in a way that
9 has been recognized to sound in habeas previously.

10 But on top of all those things, we think that even if
11 wasn't core habeas, it would still be subject to the habeas
12 rule. Notably this court in the Vetre case --

13 THE COURT: You keep saying this court, and I don't
14 think you mean me. Do you?

15 MR. ENSIGN: I actually do, Your Honor.

16 THE COURT: Okay. So the 316 F. Supp. 70?

17 MR. ENSIGN: Yes. 316 F. Supp. 3d.

18 THE COURT: Right. So I'm saying that F. Supp.
19 predates my time here. Okay. Sorry. Go ahead.

20 MR. ENSIGN: I apologize, Your Honor. Of course when
21 I mean the court, I mean the district for the District of
22 Columbia.

23 THE COURT: Right, which I'm not bound by. So if you
24 will distinguish, I try to do that in my opinions, if you
25 would be so kind.

1 MR. ENSIGN: Absolutely, Your Honor. In the Vetre
2 case, there were non-core habeas claims including
3 conditions. And in that case, this court recognized, this
4 was in a somewhat odd posture, that within DDC, that because
5 prison condition cases could be brought in habeas, they had
6 to be. And so similarly, because these claims can be
7 brought in habeas, they have to be.

8 THE COURT: The prison condition cases, again, relate
9 to the nature of confinement and duration of your
10 confinement. And here, they are not arguing that they can't
11 be confined. They are just saying they can't be removed,
12 right?

13 MR. ENSIGN: Your Honor, we are using it to address
14 whether this is core or non-core. In Vetre, a non-core
15 habeas claim was transferred under the venue rule. So
16 whether this is core habeas, as we have argued, and clearly
17 where the venue rule would apply or even if this were
18 non-core habeas, then nonetheless the venue rule still
19 applies to it as this court has recognized.

20 MR. GELERT: Your Honor, I would just say that that
21 case involved, I think you were getting at this, but the
22 length of someone's confinement.

23 THE COURT: Again, I have not gone back and reviewed
24 that case because your citation earlier, Mr. Ensign, led me
25 to believe it was not my case. I know IRLR is.

1 I guess your -- do you want to dismiss your habeas
2 claim, Mr. Gelernt? I don't know. It's certainly not your
3 primary claim. You may have other reasons for including it.

4 MR. GELERNT: Your Honor, I think if the Court felt
5 like it needed us to dismiss the habeas in order to issue a
6 class-wide TRO, then we are prepared to do that. We
7 certainly don't feel like we need it.

8 On the other hand, I think the Court could just hold
9 it in abeyance. I mean, I think that it's very clear that
10 if you don't need to bring it in habeas, you don't have to
11 and you can bring it -- in other words, I think Your Honor
12 could not have been clearer in IRLR. There are a number of
13 cases that say that. Otherwise, virtually every case would
14 be brought in habeas.

15 THE COURT: Again, I think this is a reasonably close
16 question, but I've got to rule on it with essentially 40
17 minutes' notice given that this was first raised by the
18 government in our hearing. And I'm not blaming the
19 government at all because they haven't had an opportunity to
20 brief it.

21 And so as brief as my research has been at this
22 period of time, I don't think that venue bars certification.
23 I will, for clarity, I will grant the plaintiffs' -- first
24 grant the plaintiffs' motion to dismiss their habeas count.
25 So that count is dismissed without prejudice at this point.

1 But I do find that class certification is warranted
2 under Federal Rule of Civil Procedure 23(a) and 23(b) (2).
3 So I will certify a class, and the class will be -- let's
4 talk about the definition. The plaintiffs ask for all
5 noncitizens who were, are, or will be subject to the AEA
6 proclamation and its implementation.

7 So now that we actually have a proclamation that we
8 have been able to review, Mr. Gelernt, is there a reason to
9 modify that class definition?

10 MR. GELERNT: I think certainly, Your Honor, if you
11 want to insert the name of the proclamation and the date,
12 that would be fine with us, or we could submit it to the
13 Court. But I think, if I'm understanding you correctly, I
14 think that's what you are getting at, and that would make
15 sense.

16 THE COURT: Or if there's other -- that's one point,
17 but whether there's another modification that you would
18 make.

19 MR. GELERNT: Yeah.

20 THE COURT: Go ahead.

21 MR. GELERNT: I think the other point would be that
22 it seems to be the government's position that they can begin
23 these removals pursuant to the act without publicizing and
24 publicize after the removals have started. So that makes us
25 very concerned that there could be another proclamation

1 coming tomorrow naming a different gang, MS-13 or some other
2 gang.

3 So I guess we could start with this one if Your Honor
4 would like to proceed more slowly, but there may be a
5 modification that could say any proclamation that names a
6 non-state actor.

7 THE COURT: Yeah, I'm just -- I appreciate that. I
8 feel that that's going farther than I would be prepared to
9 go as to deal with a hypothetical --

10 MR. GELERT: Right.

11 THE COURT: -- proclamation.

12 MR. GELERT: Understood.

13 THE COURT: So let me ask you, Mr. Ensign. I know
14 you are objecting to the certification of the class, and
15 this is a provisional certification only, but do you have
16 concerns, if certified, with the wording, and would you
17 propose amendments to that?

18 MR. ENSIGN: Your Honor, first, just for the record,
19 we do object to the class certification, as you know. I am
20 trying to pull up the specific language right now.
21 Candidly, it's not a question I have given thought to
22 before.

23 THE COURT: No, I understand. I understand.
24 Everybody here is operating on the fly a bit. I can tell
25 you what the -- I think I wrote the -- the language I wrote

1 down earlier was all noncitizens who were, are, or will be
2 subject to the AEA proclamation.

3 I mean, I think -- I don't know why -- Mr. Gelernt,
4 is there a reason we can't simply say all noncitizens who
5 are subject to the proclamation?

6 MR. GELERNT: I would prefer that we have will be,
7 but I understand if Your Honor thinks that are covers the
8 waterfront.

9 THE COURT: I think so. So the language would be all
10 noncitizens who are subject to the AEA proclamation, and we
11 will get the specifics, and its implementation.

12 MR. GELERNT: And so I assume, Your Honor, that would
13 mean that anybody who is designated a week from now, I mean,
14 will be would cover it obviously, assuming it's going to
15 continue designating people, so I assume that's why it is in
16 there.

17 THE COURT: Yes. Well, when you say designated, you
18 mean for removal?

19 MR. GELERNT: Well, I think they have to say you are
20 designated. I gather what the government is doing is
21 designating you as someone subject to the Alien Enemies Act,
22 and then they can do whatever they want to them, detain
23 them, remove them. And so that's why the will is in there.
24 But if Your Honor is stating on the record that are would
25 cover anybody who in the future is subject to it --

1 THE COURT: Yes.

2 MR. GELERNT: Okay.

3 THE COURT: Now or in the future is.

4 MR. GELERNT: Right.

5 THE COURT: So back to you, Mr. Ensign. Any
6 modification of that?

7 MR. ENSIGN: No, Your Honor. I mean, no, Your Honor.
8 We don't believe we have a basis to dictate to plaintiffs
9 how they would, you know, define their own class.

10 THE COURT: Okay.

11 MR. ENSIGN: But as to the substitution of, you know,
12 the specific proclamation at issue, to make it specific to
13 that, that we don't have objection specifically to that. I
14 would preserve, you know, our objections to -- we focused on
15 venue, but we don't believe the other requirements of class
16 certification have been met here. In particular, for
17 typicality, there may be very different claims as to those
18 that were lawfully admitted to the United States and those
19 who, you know, never had lawful admission.

20 THE COURT: Okay. I think, again, at this
21 provisional time, and I guess -- what we will say is APA
22 proclamation of March 15, 2025, and we can actually use the
23 specific title which I see based on the text of that.

24 Okay. So plaintiffs then are also seeking a TRO
25 related to that class. And again, so -- I'll just say a few

1 things here, that this is obviously a difficult question. My
2 ruling earlier related to the INA. This is difficult for a
3 few reasons. And again, I'm just looking at the likelihood
4 of success on the merits. And under our circuit, the
5 question is is there a serious legal question presented, not
6 is there necessarily a 51 percent chance of prevailing.

7 And there are really sort of two issues on this. The
8 first is does the political question doctrine or other -- or
9 do other prudential considerations bar judicial scrutiny of
10 the proclamation in the first place, and second, if they do
11 not bar such scrutiny, is the proclamation illegal.

12 I think that the first question is harder than the
13 second. And again, we have tried to do quick research on a
14 very expedited time frame, and I'm well aware of the
15 president's broad authority to apprehend, restrain, and
16 remove noncitizens deemed alien enemies.

17 For example, the president has unreviewable authority
18 to determine whether a state of war actually exists, and if
19 so, to remove enemy aliens in the manner he wishes.

20 So the question is does such authority extend to
21 other determinations within the statute such as invasion or
22 predatory incursion or foreign nation or government. And
23 that, unfortunately, is a question of first impression here.

24 We certainly looked at some of the cases like
25 Ludecke, L-U-D-E-C-K-E, the 1948 supreme court case, in

1 addition to Lockington versus Smith from the hoary vintage
2 of 1817, as well as Clark, which is the D.C. Circuit case
3 from 1946, and Von Heyman, H-E-Y-M-A-N, Second Circuit,
4 1947.

5 These are difficult questions. There's also a
6 helpful law review by Professor Vladeck, V-L-A-D-E-C-K, from
7 2007 in the Lewis & Clark Law Review about enemy aliens,
8 enemy property, and access to courts which sets some of
9 these points out as well.

10 So I guess, Mr. Ensign, maybe you are prepared to
11 deal with this and maybe you are not yet, but tell me why,
12 given the lack of authority regarding the president's --
13 whether the president's authority extends to his
14 determination of some of those other terms, I should hold
15 that it does.

16 Again, I know this was going to be a class cert
17 hearing and we are all racing to get up to speed on this,
18 but I will be happy to hear you if you want to discuss that.

19 MR. ENSIGN: Sure, Your Honor. As you know, there
20 isn't a lot of precedent on this, but what there is, you
21 know, recognizes the quite broad discretion of the president
22 here.

23 In particular, the Ludecke case arose from a
24 circumstance where a German plaintiff, you know, was still
25 being held under the AEA, who had a facially quite

1 reasonable claim, you know, that the war has ended, the war
2 has been over for three years, what are you doing still, you
3 know, exercising AEA authority over me.

4 And the court said quite clearly, like, no, this is
5 left to the discretion of the president, and the president
6 has determined that the war is continuing notwithstanding
7 the fact that they are not -- you know, there is not
8 fighting going on and that, in fact, the E-day was, I
9 believe, more than three years in the rearview mirror at
10 that point.

11 And so certainly when the supreme court reached this,
12 it recognized the very broad discretion of the president.
13 There's other language in that case towards the tail end of
14 it that I unfortunately don't have at my fingertips but
15 again underscores the extent to which discretion is vested
16 in the president as to these sorts of questions.

17 THE COURT: Right. But isn't -- and again, read
18 broadly, Ludecke certainly supports you, and certainly even
19 read narrowly, I understand the courts can't question the
20 president's power to remove enemy aliens or even his
21 determination that a state of war continues to exist, but it
22 did seem to accept that courts could hear challenges to the
23 construction and validity of the statute and in that case
24 challenges raising whether the person restrained is, in
25 fact, an enemy alien 14 years of age or older. That's at

1 page 171, footnote 17.

2 So read more narrowly, why doesn't it leave open the
3 question that judicial review is available to look at
4 whether certain preconditions have been met for the
5 president to invoke the statute?

6 MR. ENSIGN: Your Honor, I think the nature of the
7 claims here are ones that are more of the sort that are the
8 political questions. For example, plaintiffs are very much
9 advancing the concept that, you know, war is not something
10 that can be engaged in or, you know, is a concept that has
11 relevance as to subnational actors. I think that is a
12 question that has been reserved for the political branches.

13 In particular, for example, the Congress in 2001 gave
14 the president authorization of war powers to use against
15 subnational actors such as Al-Qaeda. Here, we have TDA has
16 specifically been designated as a foreign terrorist
17 organization. So you have a recognition that the war powers
18 do extend to this sort of context as to which plaintiffs are
19 advancing a claim.

20 And so I think that sort of claim that plaintiffs are
21 raising here sounds in that sort of core political question
22 that has been reserved for the political branches.

23 THE COURT: Mr. Gelernt, do you want to respond to
24 that?

25 MR. GELERNT: I think Your Honor made the point that

1 I was going to make. I mean, this is ultimately a
2 separation of powers question. What was going on in Ludecke
3 was whether the war was over, and it was a declared war by
4 Congress, and Congress has not stated that the war was over.
5 I think that's what the supreme court was ultimately saying.

6 I don't read Ludecke as saying that the
7 preconditions, the statutory preconditions, can't be
8 challenged; otherwise, there would be no end to what the
9 executive branch could do. This is a delegation from
10 Congress. There are very specific terms. And we read
11 Ludecke as saying that the construction of the statute can
12 be challenged and whether someone fits within the
13 proclamation can be challenged. I think Ludecke was
14 ultimately, again, about separation of powers.

15 THE COURT: And then it would seem that Clark and Von
16 Heyman are better cases for you even though they are --they
17 precede Ludecke, Mr. Gelernt. Do you agree with that?

18 MR. GELERNT: Your Honor, I don't want to get ahead
19 of myself. I have not looked back on those cases before
20 this hearing.

21 THE COURT: Okay.

22 MR. GELERNT: I think there are certainly additional
23 cases. I was simply responding to Ludecke. But I think
24 there are many other cases that allow -- that challenge the
25 statutory preconditions. I think that's, you know, sort of

1 fundamental separation of powers law. This is not sort of
2 the president invoking his inherent authority under the
3 constitution. We don't think that he would have the power
4 to do it anyway. But this is the president invoking a
5 specific statutory provision that Congress has laid out very
6 clear guidelines, and I think it would be fundamentally
7 inconsistent with separation of powers for this Court not to
8 be able to review whether those preconditions were met.

9 THE COURT: Let me ask you, in looking at the
10 language of the proclamation, why on the merits, if I got to
11 it and found it's not a political question, why don't you
12 think, Mr. Gelernt, that the proclamation suffices to say
13 that TDA is part of the Venezuelan government that is
14 involved in an invasion or predatory incursion?

15 MR. GELERNT: Well, Your Honor, I think the
16 government -- I think the proclamation doesn't even go as
17 far as actually stating that TDA is a foreign government.
18 And the language is pretty clear in the statute that you
19 need a foreign government. As Your Honor knows, the statute
20 has only been invoked three times in the history of the
21 country and always during a declared war, the War of --

22 THE COURT: Let me interrupt. So it says that, and
23 I'm reading from the proclamation, Venezuelan national and
24 local authorities have ceded ever greater control over their
25 territories to transnational criminal organizations

1 including TDA. The result is a hybrid criminal state that
2 is perpetrating an invasion of and predatory incursion into
3 the United States.

4 So why don't you think that's a foreign nation?

5 MR. GELERNT: Well, I think there's a lot of law, and
6 we will be prepared to reply to the government's submission
7 at the TRO and talk more about it at the TRO on the merits,
8 but I think there is a lot of law about what constitutes a
9 foreign government. And I don't think the United States
10 recognizes TDA as a foreign government. They recognize
11 Venezuela as a foreign government. I think that's the
12 historic understanding of the statute.

13 We also would take issue with the fact that we think
14 the Court certainly can review whether immigration
15 constitutes some kind of invasion. You know, it may be that
16 the Court can't second-guess how much of an invasion a
17 foreign government is making, that that may be a matter of
18 degree, but certainly that sort of threshold legal question
19 about whether immigration constitutes an invasion is
20 something the Court can rule on. And we know of no
21 historical precedent that would suggest that straight
22 migration or noncitizens coming and committing crimes
23 constitutes an invasion within the meaning of the statute or
24 the constitution.

25 THE COURT: Mr. Ensign, do you want to respond to

1 that?

2 MR. ENSIGN: Certainly. A few things, Your Honor. I
3 think first, they are trying to draw a distinction between
4 the statutory preconditions at issue here from Ludecke, but
5 it was statutory preconditions in both cases. Whether or
6 not there's, in fact, a war was very much the issue in
7 Ludecke. That is one of the statutory conditions. They are
8 challenging others. But it's -- they are all part of the
9 same statutory preconditions, you know, framework, are they
10 met or not. And the Court just straight up deferred to the
11 president in circumstances where a lot of people would think
12 there was not a war.

13 I guess two other things I would say. One is that
14 this -- I think this discussion very much illustrates why
15 additional briefing would be desirable to resolve this.

16 THE COURT: No, no, absolutely. I couldn't agree
17 with you more. But the question is what do we do in the
18 interim, right? No, I want further briefing from both
19 sides. I want to look at this longer. This is not easy.
20 These are not easy issues. And I appreciate everyone's
21 diligence on such short notice. But the question in a case
22 like this is why shouldn't a TRO issue to maintain the
23 status quo on difficult issues while you folks figure it
24 out.

25 In other words, maybe there's some national security

1 or other concerns that you have that you haven't raised yet
2 because you haven't learned of them yet that you could tell
3 me and I would hear, but right now it seems that the status
4 quo is keeping these folks in ICE custody but not deporting
5 them. And I'm not sure what the prejudice to the government
6 is from such a determination.

7 I mean, tell me if I'm -- to the extent you can say
8 anything that's not national security to respond to that.

9 MR. ENSIGN: Your Honor, I think two responses. The
10 first is that much of plaintiffs' irreparable harm arguments
11 were predicated on the premise that this Court would somehow
12 lose jurisdiction if people were not -- I mean, not in D.C.,
13 but in the United States. I think that was more a question
14 of habeas. Now that we are past habeas and we are really
15 just talking about APA, I don't understand why this Court
16 would necessarily lose jurisdiction.

17 THE COURT: If they are deported?

18 MR. ENSIGN: And I think second is how Nken looks at
19 it as irreparable harm where --

20 THE COURT: I think the argument -- the argument,
21 excuse me for interrupting and I will let you respond, but
22 the argument in part is these folks are going to be sent to
23 Salvadoran or Honduran prisons, which were not going to be
24 terribly receptive to Venezuelans, particularly whom you
25 have labeled TDA, and so not only are they going to be

1 deported, but it's not going to be to a friendly
2 countryside, but to prisons. So why isn't -- don't you
3 think that's irreparable?

4 MR. ENSIGN: Your Honor, I don't think that's been
5 established by their filings. More generally, I would just
6 point out that this cuts to the core of the president's
7 Article II powers. And so interfering with that, you know,
8 both in the -- both in the -- this goes to foreign powers
9 --or foreign policy. This goes to war powers. This goes
10 to immigration. These are core Article III -- or sorry,
11 Article II areas that -- I mean, this would cut very deeply
12 into the prerogatives of the executive, and for that basis,
13 we think the balance of harms are tipped sharply in our
14 direction.

15 THE COURT: So, Mr. Gelernt, do you want to respond
16 to the irreparable harm issue?

17 MR. GELERNT: Yes, Your Honor, a few things. One is
18 I think the Court would lose jurisdiction because it
19 wouldn't be able to offer a remedy.

20 THE COURT: Right. Sure. I mean, once they are out
21 of the country, I'm not sure what I can do there.

22 MR. GELERNT: Right. So you clearly would lose
23 jurisdiction. I think that alone is critical.

24 The other point is that this is just not straight
25 removal, as Your Honor has pointed out. They may be sent to

1 Guantanamo. They may be sent to El Salvador. It seems like
2 many of them already have been sent to El Salvador. They
3 are in real danger, I can't express that strongly enough, if
4 they end up in a Salvadoran prison. But even if they end up
5 back in Venezuela, many of them, all of our plaintiffs and
6 many of them, will have asylum claims, and they have been
7 tagged now as the worst of the worst by the president, and
8 so they will be in real danger in Venezuela.

9 Now, ultimately some of them may lose their asylum
10 claims in the U.S., but they are entitled, we believe, to
11 finishing that, and the Aliens Enemy Act can't circumvent
12 that point.

13 And the government keeps bringing up the Nken case.
14 Nken was very clear that the court was not going to lose
15 jurisdiction in that petition for review, that particular
16 petition for review, but also that if there was harm like
17 torture or persecution, then that would be irreparable harm.
18 The court was just making the simple point that not every
19 deportation involves irreparable harm. They could be
20 removed to the UK, and there may not be irreparable harm.

21 So I think this goes far beyond the normal type of
22 irreparable harm. And even in removal cases, of course,
23 this Court often stays things while it figures it out. These
24 are individuals who are in detention, so it's not as if they
25 are roaming around. I think for the government to

1 say that the delay in doing this is irreparable --

2 THE COURT: Let me ask you, Mr. Gelernt, let me just
3 interrupt you for a second. I think there was a little bit
4 of confusion or uncertainty in your response earlier on this
5 point. Is it fair that -- I think you equivocated a little
6 bit, and I'm not saying that in a negative way, on whether
7 all of the potential class was actually held by -- was
8 actually currently in custody in the United States. Do you
9 know the answer to that?

10 MR. GELERNT: We believe that everyone right now who
11 is going to be put on flights is in custody. I don't know
12 that the proclamation limits it to that, but I think --

13 THE COURT: So let me ask you. So what if the class
14 were narrowed to all noncitizens in United States custody?

15 MR. GELERNT: Right. I think two points about that.
16 One is that would solve the immediate problem of them being
17 put on planes, because if they are not in detention, they
18 can't be put on planes.

19 But the other point, I think, in terms of irreparable
20 harm is obviously the government remains free to arrest them
21 if they've committed an immigration violation or a criminal
22 violation and put them in detention. And as Your Honor
23 pointed out earlier, we are not seeking their release from
24 U.S. facilities. So we are not in any way saying that the
25 government needs to allow them to continue roaming the

1 streets. But if Your Honor feels like at this stage issuing
2 a TRO for the class of individuals who are currently in
3 detention or will be imminently put in detention, I think
4 that would work given that we are all moving very quickly
5 and I know Your Honor is trying to figure this out on the
6 fly.

7 THE COURT: So back to you, Mr. Ensign. In terms
8 of -- so harm to the United States by a TRO of short
9 duration regarding only people who are already in detention
10 so they can't cause any harm within the United States and
11 enjoin their removal from the United States, what's the harm
12 to the government by such a status quo TRO?

13 MR. ENSIGN: I mean, I think it cuts to the core of
14 the president's authority over critical areas that have been
15 assigned to them, that war powers, immigration, you know,
16 conducting foreign policy, like, those are harms of, you
17 know, significant sorts.

18 This is where you have an express statutory
19 authorization, so this is a Youngstown Steel, you know,
20 category 1 type case in our perspective. So we certainly
21 think there are very substantial harms.

22 I mean, you know, certainly we object to any TRO. Our
23 preference would obviously be a narrower one if there is
24 one, but we believe that any TRO impermissibly and
25 unconstitutionally infringes upon the prerogatives of the

1 president, no more so here than it would have been for the
2 supreme court in Ludecke to tell the president, you know
3 what, you're wrong, World War II is over.

4 THE COURT: Right. And that sort of is the
5 justiciability argument, not the balance of the equities
6 argument, right?

7 MR. ENSIGN: No, Your Honor. I think it sounds in
8 both. Certainly you see it more frequently in that context,
9 and usually where it applies, you will never get to
10 irreparable harm because it's not justiciable. But those
11 sorts of harms to the executive have been recognized, you
12 know, certainly as to anything that enjoins an act of
13 Congress. Maryland versus King recognizes that's
14 irreparable harm.

15 The same principle applies to, you know, the
16 injunction against the president exercising his powers both
17 inherent in Article II and those given to him by statute
18 such as the AEA.

19 THE COURT: All right. Any response to that,
20 Mr. Gelernt?

21 MR. GELERNT: No, Your Honor. I think I --THE

22 COURT: Right.

23 MR. GELERNT: I apologize. I just wanted two
24 housekeeping things, but I will do that after you finish,
25 Your Honor.