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

DANIEL ENRIQUE ZACARIAS MATOS,	§	
	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 1:25-CV-00057
	§	
FRANCISCO VENEGAS, et al.,	§	
	§	
Respondents.	§	

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING THE WRIT

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INTRODUCTION

Petitioner filed a writ of habeas corpus and moved for an emergency temporary restraining order seeking a stay of removal. ECF No. 1 (Writ). The Court issued a temporary restraining order (TRO), which was later converted to a preliminary injunction. ECF Nos. 3, 31. The parties agreed to a bifurcated briefing schedule to first address "whether [Petitioner] is a member of [Tren de Aragua] TdA, the standard that the Court should apply in determining whether Petitioner is a member of TdA, whether the Federal Rules of Evidence apply to the evidentiary hearing, and any other issues that [the parties] believe[] are relevant to the determination of whether he is a member of TdA." ECF No. 31 at 2. The Court should deny Petitioner's writ.

STATEMENT OF THE ISSUES

1. Whether Petitioner has a basis for injunctive relief.
2. Whether the Court has jurisdiction to preclude removal under Title 8.
3. Whether Petitioner is a member of TdA.
4. Whether the Court should apply the *Hamdi* standard in determining whether Petitioner is a member of TdA.
5. What procedural protections would apply to an evidentiary hearing if the Court determined a hearing was necessary.

BACKGROUND

A. The Alien Enemies Act

Central to this case, Congress gave the President broad discretionary authority to remove noncitizens in the Alien Enemies Act of 1798 (AEA):

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age

> of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.

50 U.S.C. § 21. Courts have consistently recognized the legitimacy of the AEA as a lawful exercise of the war power reserved to Congress and the Executive. *Ludecke v. Watkins*, 335 U.S. 160, 165 n.8 (1948) (collecting cases). Indeed, the Supreme Court has described the AEA "as unlimited" a grant of power to the executive "as the legislature could make it." *Id.* at 164 (quoting *Lockington v. Smith*, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817)). Courts have further explained that the statute encompasses "matters of political judgment for which judges have neither technical competence nor official responsibility." *Id.* at 170 (holding that the President's power under the AEA remained in effect even after actual hostilities in World War II had ceased). The D.C. Circuit has held the AEA confers "[u]nreviewable power in the President to restrain, and to provide for the removal of, alien enemies." *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946). Courts have limited their review in prior challenges to a few, very narrow questions that sound in habeas: "the construction and validity of the statute;" whether, when relevant, there is a "declared war;" and whether the "person restrained is an enemy alien fourteen years of age or older." *Ludecke*, 335 U.S. at 171 & n.17; *see also Trump v. J.G.G.*, 604 U.S. __, 2025 WL 1024097, at *2 (2025).

B. The President's Proclamation

The President issued Proclamation No. 10904, *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua* (the "Proclamation") on March 15, 2025. *See* 90 Fed. Reg. 13034. Therein, the President made findings that members of the transnational criminal organization TdA, in conjunction with a narco-terrorism enterprise backed by the illegitimate regime of Nicolas Maduro in Venezuela, are "conducting irregular warfare and undertaking hostile actions against the United States." *Id.* at Preamble. TdA has also "engaged in and continues to engage in mass illegal migration to the United States," including to inflict harm

on U.S. citizens and support Maduro's regime in undermining democracy. *Id.* Further, TdA is "closely aligned with" and "has infiltrated" Maduro's regime, growing under Tareck El Aissami's governance of the province of Aragua from 2012 to 2017. *Id.* Aissami himself is a "fugitive facing charges arising from his violations of United States sanctions triggered by his" designation as a Specially Designated Narcotics Trafficker under 21 U.S.C. § 1901 *et seq. Id.* And Maduro leads the "Cártel de los Soles, which coordinates with and relies on TdA and other organizations to carry out its objective of using illegal narcotics as a weapon to 'flood' the United States." *Id.*

Criminal organizations such as TdA have taken greater control over Venezuelan territory, resulting in the creation of a "hybrid criminal state" that poses "substantial danger" to the United States and is "perpetrating an invasion of and predatory incursion" into the nation. *Id.* (noting also INTERPOL Washington's finding that TdA has infiltrated the flow of immigrants from Venezuela). TdA has independently been designated as an Foreign Terrorist Organization (FTO) under 8 U.S.C. § 1189 since February 20, 2025. *Id.* That designation has not been challenged in court.

Based on these findings, the President proclaimed that "all Venezuelan citizens 14 years of age or older who are members of TdA, are within the United States, and are not actually naturalized or lawful permanent residents of the United States are liable to be apprehended, restrained, secured, and removed as Alien Enemies." *Id.* § 1. The President further directed that all such alien enemies "are subject to immediate apprehension, detention, and removal." *Id.* § 3. The Attorney General and Secretary of Homeland Security have been tasked with executing these directives, in addition to any separate authority that may exist to apprehend and remove such persons. *Id.* §§ 4, 6.

The President also issued regulations prohibiting the entry, attempted entry, or presence of the alien enemies described in Section 1 of the Proclamation, with any such alien enemies "subject to summary apprehension." *Id.* § 6(a). Apprehended alien enemies are subject to detention until

their removal from the United States, and they may be removed to "any such location as may be directed" by those responsible for executing the regulations. *Id.* § 6(b)–(c).

C. This Litigation

Petitioner Daniel Enrique Zacarias Matos is presently detained at the El Valle Detention Facility located in Raymondville, Texas pending his removal from the United States. Ex. A, Declaration of Carlos D. Cisneros (Cisneros Decl.) ¶ 6. Petitioner is a native and citizen of Venezuela. Writ ¶ 1; Cisneros Decl. ¶ 5.

On December 7, 2023, Petitioner applied for admission into the United States at the Bridge of the Americas Port of Entry in El Paso, Texas. Cisneros Decl. ¶ 5. On December 9, 2023, Department of Homeland Security (DHS) served Petitioner with a Notice to Appear (NTA)—a charging document that formally begins removal proceedings against a noncitizen—charging him as a noncitizen who arrived in the United States without being admitted or paroled in violation of 8 U.S.C. § 1182(a)(6)(A)(i). Cisneros Decl. ¶ 5.

On May 27, 2024, officers of the El Paso Police Department (EPPD) conducted a traffic stop after witnessing a stop sign violation. Cisneros Decl. ¶ 7; Ex. B, Declaration of Jesus S. Anchondo (Anchondo Decl.) ¶ 9. The officers observed the passenger door open and a black object, later identified as a stolen Glock 26 handgun land on the pavement. Cisneros Decl. ¶ 7; Anchondo Decl. ¶ 9. Both the driver—a confirmed Hoover Crips gang member—and Petitioner, who was riding in the passenger seat, fled the scene. Cisneros Decl. ¶ 7; Anchondo Decl. ¶¶ 9, 10. Petitioner resisted arrest and had to be tased before he could be apprehended. Cisneros Decl. ¶ 7; Anchondo ¶ 10. The driver claimed that he fled the vehicle because Petitioner intended to engage in a shootout with police. Cisneros Decl. ¶ 7. In addition to the handgun, EPPD recovered a black bag containing Xanax and marijuana from the scene and discovered that the car Petitioner was riding in with his Hoover Crips associate was stolen. Anchondo Decl. ¶ 9.

At the time of his arrest, an EPPD officer noticed an AK-47 rifle tattoo on Petitioner's forearm and asked Petitioner if he was affiliated with TdA. Cisneros Decl. ¶ 7. Petitioner initially denied involvement with TdA but later added, without any additional prodding, that "he was a kid back then." Cisneros Decl. ¶ 7; Anchondo Decl. ¶ 11. Beyond his TdA membership, Petitioner also admitted he spent time in prison in Venezuela for stealing a car in 2013. Cisneros Decl. ¶ 7. The vehicle Petitioner was a passenger in was determined to be stolen. Cisneros Decl. ¶ 7. EPPD took Petitioner into custody and observed that, in addition to the AK-47 tattoo on his right forearm, Petitioner had tattoos of stars and a rose on his left bicep. Cisneros Decl. ¶ 12; Ex. C, Pictures of Petitioner's Tattoos. Petitioner was charged with evading arrest, search, and transport and released on his own recognizance on May 31, 2024. Cisneros Decl. ¶¶ 8, 11. When Petitioner failed to appear for his arraignment on August 9, 2024, a bench warrant was issued. Cisneros Decl. ¶ 8. Following a traffic stop on October 12, 2024, EPPD arrested Petitioner pursuant to the bench warrant and took him into custody at El Paso County Detention Facility (EPCDF). Cisneros Decl. ¶ 8. That same day and as part of the Criminal Apprehension Program, Immigration and Customs Enforcement (ICE) Officers in El Paso, Texas spoke with the Petitioner at ECPDF and placed a detainer on him. Cisneros Decl. ¶ 8. On October 14, 2024, after posting bond in his criminal matter, the state released Petitioner to ICE custody pursuant to the detainer. Writ ¶ 15; Cisneros Decl. ¶ 9. When he was taken into ICE custody at the El Paso Service Processing Center, he requested to be placed in the holding cell where TdA members and Venezuelans were housed. Anchondo Decl. ¶ 11. On November 6, 2024, the District Attorney's office dismissed the charges based on the mistaken belief that Petitioner had been deported. Cisneros Decl. ¶ 11.

Officers within the Department of Homeland Security (DHS) identify TdA members that may be subject to detention and removal under the President's proclamation. ICE determined that

Petitioner was an active TdA member based on the "totality of the evidence," including his statements during his arrest acknowledging he was a TdA member in his youth, his association with a Hoover Crips gang member, and his conspicuously placed TdA tattoos. Cisneros Decl. ¶¶ 10-13; Anchondo Decl. ¶¶ 11-14.

Currently, Petitioner is lawfully detained as he undergoes expedited removal proceedings pursuant to 8 U.S.C. § 1225. Cisneros Decl. ¶ 6. After Petitioner claimed fear, he was referred to U.S. Citizenship and Immigration Services (USCIS) for a credible fear interview with an asylum officer. Cisneros Decl. ¶ 6. On April 14, 2025, Petitioner was served a negative credible fear determination. Cisneros Decl. ¶ 6. Petitioner requested an immigration judge review the USCIS negative credible fear determination. Cisneros Decl. ¶ 6. On April 19, 2025, an immigration judge affirmed the asylum officer's negative credible fear determination, and the matter was returned to ICE to effectuate removal under the expedited removal order. Cisneros Decl. ¶ 6. While ICE has determined that Petitioner is a TdA member, Respondents have adopted a new notice process for aliens designated alien enemies under the AEA. Cisneros Decl. ¶ 6. Petitioner has not been designated under the current notice process. Cisneros Decl. ¶ 6. If designated, he will be given a notice in a language he understands, and the process will allow petitioner time and opportunity to challenge the designation. Cisneros Decl. ¶ 6.

SUMMARY OF ARGUMENT

First, the Court does not need to reach the issue of whether Petitioner is a member of TdA because there is no basis for injunctive relief. Petitioner has not been designated under the AEA and further the equitable claims in Petitioner's writ are currently being litigated through a parallel class action in *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.).

Second, Petitioner is subject to a final order of removal, which ICE intends to effectuate

under Title 8. The INA deprives this Court of jurisdiction to review claims arising from the decision or action to "execute removal orders." 8 U.S.C. § 1252(g); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Thus, there is no need for the Court to adjudicate on ICE's hypothetical authority to proceed with removal under Title 50. However, if the Court determines that it is appropriate to evaluate whether Petitioner is a member of TdA, the government has made a sufficient showing. He admitted to TdA membership in his youth, has been arrested with known gang members, and bears TdA-related tattoos. His attempts to explain away the existence and significance of his tattoos do nothing to undermine the conclusion that he is affiliated with TdA.

Fourth, the Supreme Court has stressed that any "factfinding process" must be "prudent and incremental" when it determined the standard of habeas review in wartime status cases in *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality); *see also Boumediene v. Bush*, 553 U.S. 723, 796 (2008) ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches."). Thus, pursuant to *Hamdi*, after the government presents sufficient credible evidence to establish that Petitioner is a member of TdA, 542 U.S. at 539, Petitioner may supplement the record with his own evidence. After rebuttal, the Court may then determine whether the evidence adequately establishes Petitioner's TdA membership.

Fifth, the presentation of live testimony at an evidentiary hearing is generally inappropriate even under modern statutory habeas practice, and is certainly not constitutionally mandated for determinations of gang membership. No constitutional or evidentiary standard prohibits the Court from relying on the paper record submitted by the parties in finding facts. A "prudent and incremental" approach would require the Court to consider the parties' written submissions first,

before even considering whether to receive live testimony. By its terms, the Sixth Amendment is inapplicable to civil habeas proceedings. Thus, neither the Confrontation Clause nor the Compulsory Process Clause presents any obstacle to proceeding on a paper record. Under controlling Supreme Court precedent, this Court may consider hearsay evidence in this proceeding, and this Court should hold that it is admissible. The issue is not whether such evidence should be considered, but the weight it should be accorded. That is a determination that must be made on a case-by-case basis, and is one that "the Constitution would not be offended by a presumption in favor of the Government's evidence." *Hamdi*, 542 U.S. at 534.

Furthermore, a "prudent and incremental" process requires that the Court review the evidence first. And even if the Court concludes that more factfinding is necessary (historical habeas practice notwithstanding), it should still wholesale reject the liberal discovery standards set forth in the Federal Rules of Civil Procedure, which are generally inapplicable even to modern statutory habeas proceedings. *See Harris v. Nelson*, 394 U.S. 286, 292-98 (1969). Any discovery request should be approved by the Court and predicated on a strong and particularized showing of need.

Finally, Petitioner argues that the government must "specify whether it intends to confine Petitioner (or send him to a country where he will be confined) in a *prison*[.]" Pet. Br. at 20. The court need not reach this issue in adjudicating an emergency motion. The government has a policy governing fear claims related to third-country removals. *See D.V.D. v. U.S. Dep't of Homeland Security*, --- F.Supp.3d ----, 2025 WL 1142968, at *20 (D. Mass. Apr. 18, 2025) ("Likewise, there can be no disagreement that the same constitutional guarantees [of notice] apply to withholding-only relief."). Petitioner will have an opportunity to express fear and have that claim adjudicated consistent with DHS policy.

ARGUMENT

I. Petitioner's Claim Should be Dismissed as Premature

The Court should dismiss the writ because there is no basis for injunctive relief because Petitioner is not designated under the AEA. Indeed, Petitioner is now subject to a final order of expedited removal, which eliminates the need for the government to rely on AEA authority to effect Petitioner's immediate removal from the United States. In the event Respondents elect to designate Petitioner under the AEA, consistent with the Supreme Court's decision in *J.G.G.*, he will receive a notice indicating his designation and will have the opportunity to challenge it at that time. Cisneros Decl. ¶ 6; 2025 WL 1024097, at *2.

Federal courts have broad discretion to stay or dismiss claims "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In the interests of preserving judicial economy, a general principle has emerged that duplicative litigation between federal courts is to be avoided. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Consistent with that general principle, the Fifth Circuit has disallowed individual suits for equitable and declaratory relief brought by members of a class certified in another action, citing concerns that "individual suits would interfere with the orderly administration of the class action and risk inconsistent adjudications." *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc) (per curiam); *see also Green v. McKaskle*, 770 F.2d 445, 446-47 (5th Cir. 1985) (holding that "the individual class member should be barred from pursuing his own individual lawsuit that seeks equitable relief within the subject matter of the class action"); *Aguilar v. Rodriguez,* 158 F.3d 583, 583 (5th Cir. 1998) (disallowing plaintiff's "separate suit for equitable and declaratory relief . . . in order to avoid interference with the orderly administration of the class action").

To be sure, the concern with inconsistent and duplicative adjudications is magnified in the context of class actions certified under Federal Rule of Civil Procedure 23(b)(2). As Rule 23(b)(2)'s plain text makes clear,[1] its purpose is to permit *uniform* relief to the class *as a whole*. The (b)(2) class's defining characteristic is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132 (2009)). Therefore, it would be inappropriate to allow for an individual suit to proceed when a simultaneous class action certified under Rule 23(b)(2) is already in progress.

This Court should dismiss Petitioner's writ because his equitable claims are currently being litigated through a parallel class action in *J.A.V. v. Trump*, No. 1:25-cv-00072 (S.D. Tex.) and, thus, are not yet ripe for individual litigation. Petitioner falls within the class the district court provisionally certified under Rule 23(b)(2) as a "person that Respondents have previously claimed is subject to removal under the Proclamation and who is detained within the Southern District of Texas[.]" *J.A.V.*, --- F.Supp.3d ---, 2025 WL 1064009, at *2 (S.D. Tex. Apr. 9, 2025); Mot. for Class Cert. 10-12, *J.A.V.*, No. 1:25-cv-00072 (S.D. Tex. Apr. 9, 2025) (seeking certification under Rule 23(b)(2)). Further, Petitioner's prayer for relief asks the Court to "enjoin his imminent removal unless and until a removal order is entered against him" under 8 U.S.C. § 1229a. Writ at 8-9. His requested relief mirrors that of the plaintiffs in *J.A.V.* who ask this court on behalf of the certified class to:

> Grant a temporary restraining order to preserve the status quo pending further proceedings; Enjoying Respondents from transferring Petitioners out of this district

[1] Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

> during the pendency of this litigation without advance notice to counsel; Grant a writ of habeas corpus to Petitioners that enjoins Respondents from removing them pursuant to the Proclamation; Enjoin Respondents from removing Petitioenrs pursuant to the Proclamation; Declare unlawful the Proclamation[.]

Writ. 21, *J.A.V.*, No. 1:25-cv-00072 (S.D. Tex. Apr. 9, 2025). And indeed, a TRO was granted in *J.A.V.* giving all class members, including Petitioner, the exact, equitable relief he seeks in this suit—an order enjoining the Government "from transferring, relocating, or removing such [class members] outside of the Southern District of Texas." 2025 WL 1064009, at *2. Because Petitioner is pursuing the same relief here that is being sought on his behalf in *J.A.V.*, this Court should dismiss his claim to preserve judicial economy and avoid the potential for inconsistent adjudications that would undermine the purpose of the Rule 23(b)(2) class certified in that action.

II. The Court Does Not Have Jurisdiction to Preclude Petitioner's Removal Under Title 8 of the INA

As explained *supra* Section C, an immigration judge denied Petitioner's review of the denial of his credible fear claim. Petitioner is now subject to a final order of removal under 8 U.S.C. § 1225. However, this Court's preliminary injunction prevents ICE from effectuating that removal order. *See* ECF No. 31 (not specifying whether transfer from the El Valle Detention Center or outside of Willacy County or Cameron County, Texas is permitted under Title 8). Additionally, Petitioner requested an order prohibiting his removal "unless and until such time as he receives a final removal order," which he now has. *See* Writ ¶ 38. Petitioner cannot now challenge this final order of removal because it is unavailable in habeas for two reasons.

First, the INA precludes this Court's review of the legality of Petitioner's expedited removal order. *See* 8 U.S.C. § 1252(e). For individuals, like Petitioner, who are subject to removal under § 1225(b)(1), habeas claims are limited to determinations of three predicate facts: "whether the petitioner is an alien," "whether the petitioner was ordered removed under [§ 1225(b)(1)]," and "whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien

lawfully admitted for permanent residence, has been admitted as a refugee . . . , or has been granted asylum." 8 U.S.C. § 1252(e)(2). Here, Petitioner does not dispute that he is an alien, he has an expedited removal order, Cisneros Decl. ¶ 6, and has not been granted asylum, refugee status, or lawful permanent residence. Simply put, the Court has no basis to grant him habeas relief from his expedited removal order.

Apart from these narrow factual questions, the INA also allows challenges to the validity of the expedited removal system. But such challenges are limited to determinations of "whether [§ 1225(b)], or any regulation issued to implement [§ 1225(b)], is constitutional" or "whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3). And critically, the INA requires that such challenges be "instituted in the United States District Court for the District of Columbia." Thus, to the extent Petitioner wishes to challenge the lawfulness of the expedited removal statute and the implementing policies and regulations that justify his expedited removal, that claim must be brought in the District of Columbia. 8 U.S.C. § 1252(e)(3).

Moreover, the Supreme Court has affirmed the constitutionality of these statutory limits on judicial review of expedited removal orders. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020). The Court first rejected an argument that § 1252(e)(2) violated the Suspension Clause. *Id.* at 140-41. The Court began from the general principle that "[h]abeas is at its core a remedy for unlawful executive detention." *Id.* at 120 (quoting *Munaf v. Green*, 553 U.S. 674, 693 (2008)). Noting that the petitioner did not "want simple release but, ultimately, the opportunity to remain lawfully in the United States," the Court held that limiting review of "claims so far outside

the core of habeas" did not violate the Suspension Clause. *Id.* (internal quotations and citations omitted). The same applies here where Petitioner does not seek release but wishes to challenge the lawfulness of his removal order.

The Court likewise dismissed the petitioner's argument that the statute "violates his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding." *Thuraissigiam*, 591 U.S. at 138. The Court, citing over a century of case law, affirmed the well-settled principle that "foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law." *Id.* at 138 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"). The Court held that this principle applied to the petitioner notwithstanding the fact that he had succeeded in making it into U.S. territory before he was caught. *Thuraissigiam*, 591 U.S. at 139. The Court reasoned that the "rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil" *Id.* Observing that the "power to admit or exclude aliens is a sovereign prerogative," *id.* (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)), the Court noted that Congress had decreed that "an alien who tries to enter the country illegally is treated as an 'applicant for admission' . . . and an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.'" *Id.* at 140 (quoting 8 U.S.C. § 1225(a)(1) and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)). As that description applied to the petitioner, the Court held that the procedures set by Congress satisfied due process. *Id.* Here, the Executive Branch has exercised its sovereign prerogative to designate aliens, like Petitioner, who are apprehended within the United States and who have been continuously present in the United States for less than two years as

"arriving aliens" who have not "effected an entry." *See* Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139, 8140 (Jan. 24, 2025). Thus, as in *Thuraissigiam*, the expedited removal procedures set by Congress satisfy due process.

Second—even if this Court were to find a preliminary injunction appropriate under Title 8—it would be barred by the INA because 8 U.S.C. § 1252(g) deprives the Court of jurisdiction to review claims arising from the three discrete actions identified in § 1252(g), including the decision or action to "execute removal orders." *See Kokkonen.*, 511 U.S. at 377 ("[Federal courts . . . possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree[.]"); *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."). As relevant here, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which included provisions intended to deprive this Court of jurisdiction over Petitioner's request for injunctive relief that would effectively stay Petitioner's removal.

Congress spoke clearly, emphatically, and repeatedly, providing that "no court" has jurisdiction over "any cause or claim" arising from the execution of removal orders, "notwithstanding any other provision of law," whether "statutory or nonstatutory," including habeas, mandamus, or the All Writs Act. 8 U.S.C. § 1252(g). Accordingly, by its terms, this jurisdiction-stripping provision precludes habeas review under § 2241 (as well as review pursuant to the All Writs Act and Administrative Procedures Act) of claims arising from a decision or action to "execute" a final order of removal. *See Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471, 482 (1999).

Because a request for a stay of removal "aris[es] from the decision . . . by the Attorney General to . . . execute removal orders," the "district court lacks jurisdiction to stay an order of

removal." *Hidalgo-Mejia v. Pitts*, 343 F. Supp. 3d 667, 673 (W.D. Tex. 2018) (citing *Idokogi v. Ashcroft*, 66 F. App'x 526 (5th Cir. 2003) (per curiam) (finding that petitioner's request for a stay of deportation was connected "directly and immediately with the Attorney General's decision to commence removal proceedings against him" and "[t]he district court therefore correctly determined that it lacked jurisdiction to stay the order of removal")); *Fabuluje v. Immigr. & Naturalization Agency*, 244 F.3d 133 (Table), 2000 WL 1901410, at *1 (5th Cir. 2000) (per curiam) ("[T]he district court correctly determined that it was without jurisdiction to consider Fabuluje's request for a stay of the removal proceedings."); *see also* 8 U.S.C. § 1252(g)). Indeed, every circuit court of appeals to address this issue had held that § 1252(g) eliminates subject matter jurisdiction over habeas challenges, including constitutional claims, to an arrest or detention for the purpose of executing a final removal order. *See Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022) (holding that it lacked jurisdiction over noncitizen's habeas challenge to the exercise of discretion to execute his removal order); *Camarena v. Dir., Immigr. & Customs Enf't*, 988 F.3d 1268, 1274 (11th Cir. 2021) ("[W]e do not have jurisdiction to consider 'any' cause or claim brought by an alien arising from the government's decision to execute a removal order. If we held otherwise, any petitioner could frame his or her claim as an attack on the government's *authority* to execute a removal order rather than its *execution* of a removal order."); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 297 (3d Cir. 2020) (observing that "the discretion to decide *whether* to execute a removal order includes the discretion to decide *when* to do it" and that "[b]oth are covered by the statute"); *Silva v. United States*, 866 F.3d 938, 941 (8th Cir. 2017) (finding section 1252(g) applies to constitutional claims arising from the execution of a final order of removal, and language barring "any cause or claim" made it "unnecessary for Congress to enumerate every possible cause or claim"); *Elgharib v. Napolitano*, 600 F.3d 597, 602 (6th Cir. 2010) ("[A] natural reading of 'any other provision of

law (statutory or nonstatutory)' includes the U.S. Constitution." (quoting 8 U.S.C. § 1252(g)); *see also Hamama v. Adducci*, 912 F.3d 869, 874-77 (6th Cir. 2018) (vacating district court's injunction staying removal, concluding that § 1252(g) stripped district court of jurisdiction over removal-based claims and remanding with instructions to dismiss those claims). While the Fifth Circuit has not spoken to § 1252(g)'s reach recently, the Court has previously recognized that jurisdiction-stripping nature of § 1252(g), *see Idokogi*, 66 F. App'x 526, as well as that § 1252(g) prevents noncitizens from challenging non-discretionary decisions that are related to the discretionary decision to execute a removal order, *see Foster v. Townsley*, 243 F.3d 210, 213-14 (5th Cir. 2001).

Thus, this Court should at a minimum amend its preliminary injunction order to permit removal under Title 8.

III. Petitioner is a Member of Tren de Aragua

The sole question open to review in this Court is "whether the individual involved is or is not an alien enemy[.]" *Citizens Protective League*, 155 F.2d at 294. Plaintiff's criminal background, admissions, associations, and TdA-related tattoos clearly mark him as a member of TdA and therefore an alien enemy subject to removal under the Proclamation.

Even before the Proclamation was issued—indeed even before the current administration took office—DHS had flagged Petitioner as a TdA member. Cisneros Decl. ¶ 11. Indeed, it concluded that he "f[ell] within the Civil Immigration Enforcement Priorities that were issued on September 30, 2021, by Secretary Mayorkas in a memorandum entitled, Guidelines for the Enforcement of Civil Immigration Law (Civil Immigration Priorities Memorandum)" as a "noncitizen[] who pose[s a] threat[] to national security, public safety, and border security." ECF No. 10 (A-File, Matos Temp657) at 013.

Pursuant to the President's invocation of the Alien Enemies Act, DHS again reviewed the available evidence related to Petitioner and confirmed its prior conclusion that he is a TdA member.

Cisneros Decl. ¶¶ 10-14. Petitioner admitted to an EPPD officer that he was affiliated with TdA when "[he] was a kid" following an arrest where he was observed discarding a stolen gun and apprehended fleeing on foot from a stolen vehicle. *Id.* ¶ 7. Further, he was arrested with a known Hoover Crips gang member. *Id.* Finally, Plaintiff has multiple tattoos indicating his membership in TdA, including an AK-47 on his right forearm. *Id.* ¶ 12. Numerous law enforcement agencies, including the Policia de Investigaciones de Chile, have identified AK-47 and rifles as tattoos identifying "soldiers" within TdA. Anchondo Decl. ¶ 12. Beyond Petitioner's AK-47 tattoo, ICE intelligence and open source materials have identified rose and star tattoos like those Petitioner bears on his left bicep as signifiers of TdA membership. Cisneros Decl. ¶ 12.

Petitioner offers a series of explanations for his tattoos that are implausible and plagued by inconsistencies. Petitioner claims that he got all of his tattoos around 2006 when he was 21 years old. Pet. Decl. ¶ 37. He further claims the gun tattoo was inspired by Puerto Rican reggaeton artist Ñengo Flow and the gun was on the cover of one of his CDs. Pet. Decl. ¶ 36. A review of Ñengo Flow's discography does not show any albums with an AK-47 on the cover. *See* Ñengo Flow Albums, Genius, *available at* https://genius.com/artists/Nengo-flow/albums. On Apple Music, the album art for the single "47 Remix," on which Ñengo Flow is featured, prominently features an AK-47. *See, e.g.*, Apple Music, 47 (Remix) – Single, *available at* https://music.apple.com/us/album/47-remix-single/1220604609. But that single was not released until March 31, 2017—eleven years after Petitioner claims he got his tattoos. *See id.* Further, the AK-47 on the single cover differs in several respects from the tattoo Petitioner claims it inspired. *See* Ex. C at 4. There is no strap in Petitioner's tattoo, nor is there a cross super-imposed over the stock as in the album art. *Id.* Petitioner also claims that his tattoo says "Real G-4 for life" in homage to Ñengo Flow. *Id.* While Ñengo Flow has multiple albums entitled Real G4 Life, the first of them

was released in 2011—five years after Petitioner claims he got his tattoo. *See* Ñengo Flow Albums.

In short, Petitioner's post hoc explanation for his gang tattoos does not stand up to a simple Google search and certainly does not outweigh the clear evidence of his membership in TdA.

IV. This Court Should Require that Any Factfinding Regarding Petitioner's Membership in TdA be Evaluated Using the *Hamdi* Standard

Hamdi provides the appropriate framework for this proceeding. The "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi*, 542 U.S. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).[2] While, federal courts have "review[ed] applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace," *Rasul v. Bush*, 542 U.S. 466, 474 (2004), the scope of review has been particularly limited in cases dealing with the military in periods of armed conflict. *See Burns v. Wilson*, 346 U.S. 137, 139 (1953) ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in the civil cases.").

This case presents the question of what habeas procedures are constitutionally compelled to review whether Petitioner is a member of TdA. For that question, the most relevant precedent is *Hamdi*. In that case, the Supreme Court established a framework for adjudicating statutory habeas petitions filed on behalf of *citizens* detained in the United States as enemy combatants. And while *Boumediene* did not specify the precise procedural rules for constitutional habeas proceedings, the Court did identify certain elements that are "constitutionally required." 553 U.S. at 786. The procedures afforded under the modern habeas statute and rules might define a ceiling of protection, but they clearly do not define a floor. Thus, the *Hamdi* framework is more than

[2] Under the rationale of *Marks v. United States*, 430 U.S. 188, 193 (1977), the plurality is the controlling opinion in *Hamdi* and is binding on this Court.

sufficient in the context of a habeas action filed by a noncitizen detained as an alien enemy for three reasons.

First, because noncitizens are entitled to lesser (and certainly not greater) constitutional protections than citizens, the framework that the Supreme Court deemed constitutionally sufficient for citizens, like Hamdi, held as wartime enemy combatants is more than constitutionally adequate for noncitizens, like Petitioner, detained as alien enemies. The proposition that citizens and non-citizens may be extended different constitutional protections is well established. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990); *cf. Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). Simply put, if the *Hamdi* framework was sufficient for a citizen, it necessarily must be good enough for a noncitizen.

Second, and as the controlling plurality recognized in *Hamdi*, "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting." *Hamdi*, 542 U.S. at 535. Habeas review accommodates such limitations because the writ's "precise application . . . change[s] depending upon the circumstances." *Boumediene*, 553 U.S. at 779. The *Hamdi* framework is fully consistent with the constitutionally-required elements of habeas identified by *Boumediene*. Under *Boumediene*, a constitutional habeas court must have "some authority to assess the sufficiency of the Government's evidence against the detainee." *Id.* at 786. *Hamdi* provides the necessary elements of habeas review that, according to *Boumediene*, "accords with [the] test for procedural adequacy in the due process context." *Id.* at 781 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In sum, the *Hamdi* framework allows this Court to assess the sufficiency of the evidence and allows the petitioners to submit their own evidence.

Hamdi also is a vital precedent on the procedures to be employed in habeas because *Boumediene* did not address all of the procedures to be employed and did not hold that the *Hamdi* framework was inappropriate for federal court habeas proceedings. Moreover, *Boumediene* disclaimed addressing what procedures are required in cases where enemy combatants were detained at Guantanamo, leaving *Hamdi*'s analysis untouched. *See id.* at 798 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention."); *id.* at 796 (the "remaining questions are within the expertise and competence of the District Court to address in the first instance"). Under *Hamdi*'s framework, citizen enemy combatants are entitled to the "core" protections that constitute the "minimum requirements of due process." *Hamdi*, 542 U.S. at 535, 538. These core procedural rights are threefold: first, a detainee "must receive notice of the factual basis for his classification"; second, a detainee must have "a fair opportunity to rebut the Government's factual assertions"; and, third, the hearing must occur "before a neutral decisionmaker." *Id*. at 533. No more can be required as applied to alien enemies.

Third, adopting the *Hamdi* framework provides the appropriate balance between a noncitizen detainee's right under *Boumediene* to challenge his continued detention with the government's competing legitimate interests. In assessing what process is constitutionally required for evaluating the detainee's habeas petition, the *Hamdi* plurality applied the balancing test from *Mathews v. Eldridge*, under which "'the private interest that will be affected by the official action'" is balanced "against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (quoting *Mathews*, 424 U.S. at 335). On one side of the balance, the Court weighed the detainee's liberty interest in being free from physical detention. *Id.* "On the other side of the scale are the weighty and sensitive Governmental interests in ensuring that those who have in fact fought with the enemy

during a war do not return to battle against the United States." *Id.* at 531; *see id.* at 536 ("[O]ur due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action.").

Thus, the *Hamdi* plurality recognized that "the exigencies of the circumstances may demand that, aside from the[] core elements [of notice and an opportunity to rebut the government's factual assertions], enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* Similar concerns are present here given the Proclamation's satisfaction of both conditions of 50 U.S.C. § 21 requiring "an[] invasion" or a "predatory incursion" that is "perpetrated," or "attempted," or "threatened against the territory of the United States" and made by a "foreign nation" or "government." The *Hamdi* plurality thus explained, for example, that "[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government in such a proceeding." *Id.* at 533-34. Similarly, the *Boumediene* Court, while not providing an exhaustive explanation of permissible procedures, recognized that similar accommodations would need to be made. *Boumediene*, 553 U.S. at 796.

In light of these competing interests, and to provide a workable mechanism to balance them, as well as to address the unique separation-of-powers concerns presented by enemy combatant litigation, the *Hamdi* plurality endorsed a "burden-shifting scheme" under which the government has the initial burden to "put[] forth credible evidence that the habeas petitioner meets the enemy-combatant criteria." 542 U.S. at 534. The plurality noted that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* Under such a scheme, following a showing of credible evidence by the government, the burden would

"shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id.* This approach "meet[s] the goal of ensuring that [any wrongly accused person] has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant." *Id.* These *Hamdi* procedures, which the Court explained are constitutionally sufficient for habeas proceedings involving U.S. citizens detained as enemy combatants in the United States, are *a fortiori* constitutionally sufficient for habeas procedures involving noncitizens detained as alien enemies. And because the procedures are spelled out by the Supreme Court, they are binding on this Court.

V. The Government's Determination that Petitioner is a Member of TdA is Entitled to Some Deference

Respondents agree with Petitioner that after a review of the cases brought under prior invocations of the Alien Enemies Act, the judiciary does "not explicitly address what level of deference, if any, the court gave to the government's nationality determination, a review of the opinions themselves reveals no substantial deference." Pet. Br. at 15; *see, e.g.*, *U.S. ex rel. Zeller v. Watkins*, 72 F. Supp. 980, 981 (S.D.N.Y. 1947), *aff'd*, 167 F.2d 279 (2d Cir. 1948); *United States ex rel. Von Heymann v. Watkins*, 159 F.2d 650, 652 (2d Cir. 1947); *United States ex rel. Kessler v. Watkins*, 163 F.2d 140, 141 (2d Cir. 1947); *U.S. ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 565 (S.D.N.Y.), *aff'd*, 158 F.2d 853 (2d Cir. 1946); *U.S. ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 900 (2d Cir. 1943); *Ex parte Zenzo Arakawa*, 79 F. Supp. 468, 472 (E.D. Pa. 1947).

However, AEA precedent establishes that the role of the courts is only to assess whether a detainee is subject to the AEA proclamation, not to probe the national security and foreign-policy judgments of the President. *Ludecke*, 335 U.S. at 163-64 (providing habeas review only of whether detainee was subject to the proclamation and silent on the issue of deference); *see also J.G.G.*,

2025 WL 1024097, at *2 (opining on limited judicial review under the AEA); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[The Supreme Court] ha[s] long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (cleaned up)). Thus, Respondents are entitled to deference in making the determination that Petitioner is a member of TdA.

VI. Petitioner is Entitled to Basic Procedural Protections

"[I]n this context, AEA detainees must receive notice after the date of this order that they are subject to removal under the Act. The notice must be afforded within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs." *J.G.G.*, 2025 WL 1024097, at *2; *but see Thuraissigiam*, 591 U.S. at 139 ("[Noncitizens] who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are treated for due process purposes as if stopped at the border." (cleaned up)); *Schlueter*, 67 F. Supp. at 565 ("[S]ince the alien enemy is not, under the Constitution and the statute, entitled to any hearing— and so it has been held in this district— he cannot be heard to complain of the character of the hearing he did receive.").

As discussed in Section II *supra*, Respondents propose a burden-shifting framework to address the special circumstances of this case. *Cf. Hamdi*, 542 U.S. at 534. This differs from typical habeas actions, where the petitioner alone generally bears the burden of proof. *See Garlotte v. Fordice*, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof."); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 314 (1946) ("[Petitioner] had the burden of

showing that he was unlawfully detained."); *Williams v. Kaiser*, 323 U.S. 471, 472, 474 (1945) (similar); *Walker v. Johnson*, 312 U.S. 275, 286 (1941) (similar); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (similar).

The process will ordinarily began with the government's designation notice. If the Petitioner challenges that designation, the Government will "put[] forth credible evidence that the habeas petitioner" met the criteria in order for ICE to determine that Petitioner is a member of TdA. *See Hamdi*, 542 U.S. at 534. This gives the petitioner full "notice of the factual basis for his classification." *Id.* at 533. The government's response is supported by credible evidence, and the burden shifts to the petitioner to rebut, "with more persuasive evidence," the Government's classification. *Id*. at 534. This affords Petitioner "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," *id.* at 533, and gives the Court a chance "to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding." *Boumediene*, 553 U.S. at 786. The parties should then have the opportunity to brief the legality of detention based on the record and to make arguments as to the credibility and weight of the evidence presented. However, if Petitioner is unable to overcome the government's evidence, no further steps need be taken and the government prevails.

In executive detention cases, courts traditionally conduct only limited factual review. *See Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 306 (2001). Respondents expect that the Court will be able to decide this case on the written record. Hearings involving live witness testimony will be almost entirely inappropriate. What *Hamdi* and *Boumediene* make clear, in prescribing a "prudent and incremental" approach that recognizes "proper deference" to the political branches in the "procedural and substantive standards used to impose detention to prevent acts of terrorism," is that evidentiary hearings with live testimony should be the last resort, only

after all other alternatives have failed. *Hamdi*, 542 U.S. at 539; *Boumediene*, 553 U.S. at 796; *see also* 553 U.S. at 770 ("habeas procedures" should be "modified to address" "practical barriers"). Courts can and should rely on affidavits from reliable sources and intelligence gathered by agents of the United States Government in the course of performing their sworn duties.

As with discovery discussed *infra*, there is no constitutional entitlement to an evidentiary hearing in habeas cases. The fact that a "trial may be had *in the discretion* of the federal court," *Brown v. Allen*, 344 U.S. 443, 463-64 (1953) (emphasis added), only confirms that a testimonial hearing is not constitutionally required. While the courts historically have looked at the sufficiency of the factual submissions, there is no tradition of trial-type proceedings. *See Ex parte Bollman*, 4 Cranch 75, 135 (1807) (determining whether "there is . . . sufficient evidence" to "justify his commitment" based on the written record); *see also St. Cyr.*, 533 U.S. at 306 (traditional habeas review in executive detention context was for "some evidence"). More importantly, neither *Hamdi* nor *Boumediene* suggested that a testimonial hearing would be appropriate or required in these circumstances. Instead, they simply require that this Court be able to consider factual submissions of the parties on the propriety of detention. *See Boumediene*, 553 U.S. at 786; *Hamdi*, 542 U.S. at 533 (Fifth Amendment requires that detainee simply have a "fair opportunity to rebut the Government's factual assertions"). The *Hamdi* plurality made clear that the procedures and factfinding mechanisms available to wartime detainees should reflect their "'probable value' and the burdens they may impose on the military." 542 U.S. at 533 (quoting *Mathews*, 424 U.S. at 335); *see id.* at 533-34 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding."). Thus, the Constitution does not require a testimonial hearing with live witnesses, as opposed to documentary evidence and written testimony by affidavit.

Evidentiary proceedings should be allowed only when the court determines that, absent an evidentiary hearing, the weight of the evidence supports the habeas petitioner. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing"). As *Hamdi* itself suggests, at the initial stage of written submissions, once the government establishes a plausible case for detention, the evidence is presumed correct and the detainee must then produce a traverse with "more persuasive" evidence for the proceedings to continue. 542 U.S. at 534. Even assuming that the Constitution sometimes might require an evidentiary hearing with live witnesses, that issue could not arise, consistent with the "prudent and incremental" process required by *Hamdi*, until after a detainee has rebutted the Government's initial showing with "more persuasive" evidence. *Id.* at 534, 539; *cf. United States ex rel. Hack v. Clark*, 159 F.2d 552, 554 (7th Cir. 1947) (finding no error in the district court's dismissal of a habeas petition holding there was no due process violation in denying petitioner a hearing prior to removal). Thus, "the district court need not hold an evidentiary hearing for each habeas petitioner." *Tijerina v. Thornburgh*, 884 F.2d 861, 866 (5th Cir. 1989) (citing *Kaufman v. United States*, 394 U.S. 217 (1969); *Harris*, 394 U.S. at 286).

With the assistance of counsel, petitioners should have an unfettered ability to present their best evidence, and to challenge the Government's evidence, through written submissions. That by itself is far more than the process historically available in habeas. To the extent that petitioners wish to go even further, and to demand an evidentiary hearing with live witnesses, the courts should defer ruling on those demands until after reviewing the written submissions, and should grant them rarely if ever. As even modern statutory habeas practice makes clear, habeas courts "summarily hear and determine the facts." 28 U.S.C. § 2243.

The Sixth Amendment does not confer on petitioners a right to compel the production of personnel who provided evidence to the habeas court. *See Coleman* v. *Balkcom*, 451 U.S. 949, 954 (1981) (Marshall, J., dissenting from denial of certiorari) ("A habeas corpus proceeding is, of course, civil rather than criminal in nature, and consequently the ordinary Sixth Amendment guarantee of compulsory process . . . does not apply."). The Fifth Amendment also does not entitle petitioner to compulsory process or confrontation. Even if the Fifth Amendment applies it cannot encompass confrontation or compulsory process because *Hamdi* very plainly explained that detention could be justified based upon information about a detainee's capture made by "a knowledgeable affiant" who would "summarize [the Government's] records." *Hamdi*, 542 U.S. at 534.

Hamdi establishes that hearsay is the norm, not the exception, in the parties' submissions and during an evidentiary hearing if one is required. As the controlling plurality explained, "[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government" in these habeas proceedings. *Id.* at 533-34. That statement does not set forth a standard for admissibility, but rather identifies what is likely the *best* evidence available. Indeed, the *Hamdi* plurality specifically directed the lower courts to consider the second-hand statements of government officials regarding a detainee's actions where the official was familiar with relevant government practices and has reviewed the government's "records and reports." *See id.* at 512-13, 534, 538 ("[A] habeas court . . . may accept affidavit evidence like that contained in the Mobbs Declaration.").

Even if the Constitution required some limits on consideration of hearsay, those limits would surely devolve to the *weight* the habeas court should give to the evidence rather than the question of admissibility. Courts have repeatedly recognized that the hazards associated with the

introduction of hearsay evidence before jury trials apply with much diminished force in trials before a judge. *See*, *e.g.*, *United States* v. *Cardenas*, 9 F.3d 1139, 1155 (5th Cir. 1993); *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981) ("The exclusion of this evidence under Rule 403's weighing of probative value against prejudice was improper. This portion of Rule 403 has no logical application to bench trials."). Accordingly, in civil bench trials, "many experienced judges admit hearsay they deem reasonably reliable and probative, either 'for what it is worth' or on some more explicit rejection of the hearsay rule and its some 30 exceptions." *Cobell v. Norton*, 224 F.R.D. 1, 5 (D.D.C. 2004) (citing *McCormick on Evidence*, 137 (2d ed. 1972), and Kenneth C. Davis, *Hearsay in Nonjury Cases*, 83 Harv. L. Rev. 1362 (1970)). Moreover, in pretrial detention hearings before a judge, Congress expressly provided that the limitations on hearsay *do not apply*. 18 U.S.C. § 3142 ("The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing."). "It is well settled that in a non-jury trial the introduction of incompetent evidence does not require a reversal in the absence of an affirmative showing of prejudice." *United States* v. *McCarthy*, 470 F.2d 222, 224 (6th Cir. 1972); *see also Holt* v. *Sarver*, 442 F.2d 304 (8th Cir. 1971) (noting that in nonjury cases there will typically be no reversal for the erroneous reception of evidence). In weighing the hearsay evidence, "the Constitution would not be offended by a presumption in favor of the Government's evidence." *Hamdi*, 542 U.S. at 534. Such a presumption is both appropriate and necessary. Thus, to the extent that any constitutional question is presented at all, the issue in these cases would be not whether hearsay evidence should be admitted, but what weight particular evidence should be accorded in a particular proceeding.

Petitioner argues that "depending on the nature of the evidence the government presents, Petitioner reserves the right to see leave to take some discovery." Pet. Br. at 19. There is no

significant history of discovery in habeas proceedings and discovery is certainly not constitutionally required. The point of habeas is to provide the court with evidence to justify the detention (and to provide petitioners the opportunity to submit their evidence that detention is unlawful). *Boumediene*, 553 U.S. at 785-86. The purpose is not to provide alien enemy detainees an opportunity to obtain additional materials from the government. *See Harris*, 394 U.S. at 293 (concluding that Federal Rules of Civil Procedure on discovery do *not* apply to habeas proceedings and explaining that "prior to [the promulgation of the federal rules in] 1938" there was no showing made that "discovery was actually being used in habeas proceedings").[3] Modern developments in statutory habeas procedure cannot alter this constitutional ceiling. Thus, it is of no moment that in *Harris* the Court interpreted the All Writs Act, 28 U.S.C. § 1651, to authorize limited discovery in statutory habeas cases at the discretion of the court. Indeed, the fact that discovery, even in modern statutory habeas cases, is *entirely discretionary*, *see Harris*, 394 U.S. at 300, Habeas Rule 6(a), provides a complete answer to the question whether it is constitutionally required. The notion that the Constitution, or traditional habeas practice as of 1789 or later, requires any discovery to Petitioner is demonstrably false.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's writ.

[3] "It is also of some relevance that in 1948, when Congress enacted 28 U.S.C. § 2246 expressly referring to the right of parties in habeas corpus proceedings to propound written interrogatories, its legislation was limited to interrogatories for the purpose of obtaining evidence from affiants where affidavits were admitted in evidence. Again, the restricted scope of this legislation indicates that the adoption in 1938 of the Federal Rules of Civil Procedure was not intended to make available in habeas corpus proceedings the discovery provisions of those rules," *Harris*, 394 U.S. at 296, let alone that the *Constitution* requires any discovery at all.

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