No. 24A931

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.

Applicants,

v.

J.G.G., ET AL.

ON APPLICATION TO VACATE THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

BRIEF OF *AMICI CURIAE* STATE DEMOCRACY DEFENDERS FUND AND CONSERVATIVES IN OPPOSITION TO THE APPLICATION TO VACATE AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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STATEMENT OF INTEREST AND INTRODUCTION

State Democracy Defenders Fund (SDDF) is a bipartisan, nonprofit organization committed to upholding the rule of law and defending the Constitution. The other *amici* on this brief (collectively with SDDF, *Amici*) are conservatives and include former public officials who were elected as Republicans or served in Republican administrations. These *amici*—identified at the end of this brief—have collectively spent decades in public service in the federal government and state governments. They share a commitment to limited government, the rule of law, and protecting American citizens and residents from government overreach, particularly when that overreach threatens our freedoms and liberty. *Amici* write to express their deep concern that the Applicants' position in this case would undermine our constitutional order by usurping the function of the Judiciary and eviscerating basic principles of judicial review that, including and especially when national security interests are at stake, protect individual liberty.[1]

The Application's description of the question presented obscures the harm that Applicants' position would inflict on our form of government. This case is not "about who decides how to conduct sensitive national security-related operations in this country—the President … or the Judiciary …." Appl. 1. There is no doubt that the President is responsible for national security. This case instead presents the question

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief, and no person other than *Amici* or their counsel contributed money toward the preparation or submission of this brief.

of which Branch has the final word on interpreting the limits that Congress placed on the exercise of presidential authority under the Alien Enemies Act (AEA or the Act), 50 U.S.C. §§ 21–24. The answer to this question is the Judiciary, but Applicants assert that presidential proclamations and actions purporting to invoke the AEA are largely immune to judicial review. *See* Appl. 4, 17–19.

The AEA grants the President extraordinary powers to summarily detain and remove so-called "alien enemies" but strictly conditions those powers on the existence of wartime conflicts with foreign nations. The President may invoke the Act only in the event of a "declared war" with or an "invasion or predatory incursion" by a "foreign nation or government." 50 U.S.C. § 21. If none of these events is occurring or threatened, the President has no authority to act under the AEA. *See* Appl. App. 3a ("The [AEA] contains two provisions: a conditional clause and an operative clause. The conditional clause limits the AEA's substantive authority to conflicts between the United States and a foreign power." (Henderson, J., concurring)). Judge Henderson found that the President's proclamation of March 15, 2025, Appl. App. 176a (Proclamation), which purported to invoke the AEA against non-citizen members of the Venezuelan gang Tren de Aragua (TdA) for its involvement in illegal immigration and drug trafficking, likely failed to meet these statutory criteria. Appl. App. 17a, 23a–24a.

Applicants re-write the AEA to merely "require[] the President to make … findings" that his statutory powers are in effect and question whether "courts could look behind the President's determinations" while asking this Court to grant relief.

Appl. 5, 31. This position is incorrect and dangerous. Congress expressly conditioned the Executive's AEA authorities to times of "declared war," "invasion," or "predatory incursion," and it is the Judiciary's role—not the President's—to construe the Act and judge whether the President's determination that one of these conditions exists complies with the statute. Nevertheless, Applicants have already removed some 137 people from the United States[2] based on conclusory "findings" that Applicants now say are virtually unreviewable. Appl. App. 177a.

While *Amici* recognize the need to enforce our immigration laws and fight crime, our constitutional order does not allow the President to eschew the limits Congress imposed on executive actions. Judicial review is intrinsic to the essential checks and balances the Framers enshrined in our constitutional system. Such review prevents the abuse of executive authority by ensuring that the President exercises the powers conferred by the AEA only in the circumstances Congress specified. Applicants' request to vacate the Temporary Restraining Orders issued by the district court invites the Court to hold that the Executive's implementation of the Act is largely shielded from review by Article III courts, even when the President acts outside the context of war that Congress made necessary to the AEA's use. The Court should reject this invitation to subvert our constitutional order and leave the Temporary Restraining Orders in place.

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[2] *See* Scott MacFarlane, *Judge blocks Trump from using wartime Alien Enemies Act of 1798 to deport immigrants*, CBS News (Mar. 17, 2025), https://perma.cc/V673-SNAE.

ARGUMENT

The Court should deny the Application and reject the dangerous proposition that actions taken by the Executive under the AEA are "largely unreviewable." Appl. 18. As Judge Henderson recognized below, Congress imposed a "conditional clause [that] limits the AEA's substantive authority to conflicts between the United States and a foreign power." Appl. App. 3a. These limits allow the President to detain and remove individuals only if: (1) there is a "declared war" or "any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States"; and (2) such an "invasion or predatory incursion" is made by a "foreign nation or government." 50 U.S.C. § 21. Under the separation of powers and checks and balances of our constitutional order, "[i]t is emphatically the province and duty of the Judicial Department"—not the Executive—"to say what the law is" and so to review presidential actions that invoke that law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Though Applicants assert that judicial review is causing irreparable harm to national security, Appl. 36, "[t]o deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power…." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).

Applicants' arguments to the contrary are inconsistent with this Court's precedent, and invite further damage to the rule of law, the separation of powers, and constitutional checks and balances. While it is true that the AEA "grants the President an authority 'as unlimited as the legislature could make it,'" Appl. 18

(quoting *Ludecke v. Watkins*, 335 U.S. 160, 164 (1948)), this Court has only held that the President's "discretion" under the Act cannot be reviewed, Appl. 19 (quoting same). The President has no discretion to wield his authority to detain and deport under the AEA without the statute's conditional clause first being satisfied, and the *Ludecke* Court expressly stated that courts could review whether the conditions precedent for invoking the AEA—a war, invasion, or incursion by a foreign nation—existed. *See Ludecke*, 335 U.S. at 171. That 137 people may already have been deported unlawfully, and in light of past presidents' broad and punishing (even where legal) uses of the AEA and other war powers, makes it even more critical that the Proclamation be subject to judicial review to ensure that the President has not exceeded his authority.

I. Presidential actions under the Alien Enemies Act are subject to judicial review to determine whether the President is exceeding his statutory authority.

Applicants' questioning of the Judiciary's power to evaluate the lawfulness of proclamations issued under the AEA misconstrues the statute and this Court's precedent and cannot be reconciled with the separation of powers. The AEA grants the President no authority to remove any person from the United States unless there "is" a "declared war" with, or an "invasion or predatory incursion" by, a "foreign nation or government." 50 U.S.C. § 21. These terms' meanings were "fixed at the time of enactment," and it is for the courts to determine those meanings. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01 (2024). Under our constitutional system, this job belongs only to the courts. *See United States v. Dickson*, 40 U.S. 141, 162 (1841) (Story, J., for the Court) ("[T]he Judicial Department has imposed upon it, by

the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."); *see also* The Federalist No. 78 (Alexander Hamilton), https://perma.cc/Y5S2-P9YN ("The interpretation of the laws is the proper and peculiar province of the courts.").

Relying on *Ludecke*, Applicants assert that "judicial review under the AEA is exceedingly limited," Appl. 17–18, and question the propriety of courts "look[ing] behind the President's determinations" of an invasion or "predatory incursion" of the United States by TdA. *Id.* at 31–32. *Ludecke*, however, only recognized limitations on judicial review concerning policy questions—not at issue here—that lie far outside courts' competence, such as when a declared war ends. *See* 335 U.S. at 167–70; *see also* Appl. App. 14a ("*Ludecke* itself couched its holding in the line between law and policy and the role of the judge to only decide the former." (Henderson, J., concurring)).

Contrary to Applicants' assertions, *Ludecke* affirmed courts' constitutional authority to review one of the legal questions presented here: whether circumstances supporting a proclamation under the AEA satisfy the Act's conditional clause. As Judge Henderson recognized below, Appl. App. 13a, the Court took pains to preserve judicial review over "questions of interpretation and constitutionality" arising under the AEA. *Ludecke*, 335 U.S. at 163. Indeed, *Ludecke* expressly stated that "resort to the courts may be had … to question the existence of the 'declared war'"—in other

words, to verify whether the AEA's conditional clause had been satisfied. *Id.* at 171.[3] The Court thus rejected Applicants' crabbed view of judicial review of the President's exercise of authority under the AEA.

Applicants' position, moreover, is inconsistent with this Court's recognition that the basic principle of judicial review is unyielding, even in the face of national security interests. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 559 (2006) (emphasizing "the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty."). Under our constitutional order, "[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).[4] Here, the AEA's plain text sets conditions precedent to the President's removal authority. The President's fatally flawed invocation of the AEA to

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[3] Several years later, after Congress "terminated" its declaration of war with Germany, this Court held that a detained German citizen was "no longer removable" under the AEA because the predicate condition no longer existed. *U.S. ex rel. Jaegeler v. Carusi*, 342 U.S. 347, 348 (1952); *see also U.S. ex rel. Kessler v. Watkins*, 163 F.2d 140, 141–42 (2d Cir. 1947) (construing "declared war" in the AEA to determine whether one was ongoing).

[4] *See also Ex parte Milligan*, 71 U.S. 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

summarily remove individuals from the country manifestly violates that "framework of the law," and judicial review is necessary to preserve the allocation of authority among the Branches and the rule of law.[5]

II. Judicial review of actions under the AEA is critical to curtailing abuses of power.

The implications of the President's attempt to shield his actions from scrutiny are broader than merely fast-tracking the deportation of unsympathetic criminals. In addition to being wrong as a matter of law, Applicants' view that the President can detain and deport non-citizens with virtually no judicial review invites the exercise of unchecked power to remove the enemy of the day. Experience—both historical and recent—shows that wartime presidential authority is susceptible to abuse. It is therefore critical that courts exercise judicial review to ensure that the Executive does not use this extraordinary power except as Congress authorized.

The AEA has been invoked on only three previous occasions: during the War of 1812 and the First and Second World Wars. Though generally legal—all three of those wars were declared by Congress—past presidents' broad applications of the AEA and similar authorities demonstrate how these extraordinary powers could be grossly abused in more ordinary times. After Congress declared war with Great Britain in June 1812, British citizens in the United States were required to report to local authorities, were forced to move at least 40 miles from coastal areas, and faced

[5] *See United States v. Lee*, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.").

travel restrictions and monitoring.[6] A century later, President Wilson invoked the AEA the same day that the United States entered World War I, requiring roughly 480,000 German-born residents to register with authorities and curtailing their movements and communications.[7] Additionally, about 10,000 designated enemy aliens were arrested and 2,300 detained, sometimes for years after hostilities had ended in 1918.[8]

Then, during World War II, the federal government used the AEA to detain roughly 31,000 individuals of Japanese, German and Italian ancestry in internment camps.[9] In a little-known extension of AEA authority, President Roosevelt coordinated with fifteen Latin American governments during the war to seize and deport some 6,600 Axis nationals to the United States for internment under the guise of "hemispheric security."[10] Separately, under the president's broadly asserted war powers (as opposed to the AEA), the United States also interned approximately 80,000 citizens of Japanese descent[11] solely on the basis of that ancestry—an abuse

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[6] *See* James Monroe, "Circular to the Secretary of the Mississippi Territory (July 11, 1812)", in *Alien Enemies Documents (War of 1812), 1812–1815*, Doc. No. 5, Miss. Dep't of Archives & Hist., https://perma.cc/3CJE-Q7JE.

[7] *World War I Enemy Alien Records*, Nat'l Archives, https://perma.cc/LT77-35CM (last reviewed May 22, 2023).

[8] Matthew Stibbe, "Enemy Aliens and Internment," in *1914–1918-Online: Int'l Encyclopedia of the First World War* (Ute Daniel et al. eds., Freie Universität Berlin, Oct. 8, 2014), https://perma.cc/LRS8-6ZFE.

[9] *World War II Enemy Alien Control Program Overview*, Nat'l Archives, https://perma.cc/HS5V-6J7A (last reviewed Jan. 7, 2021).

[10] *Id.*

[11] *A Brief History of Japanese American Relocation During World War II*, Nat'l Park Serv., https://perma.cc/GKF8-GBM7 (last updated Mar. 20, 2023).

which the Supreme Court at the time blessed, but which was "objectively unlawful and outside the scope of Presidential authority." *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944)). Each of these invocations of the AEA or constitutional authority was applied broadly and had serious, long-standing consequences that counsel careful judicial review in the present case.

The President's attempt to take equally extraordinary actions under the AEA illustrates why Congress limited the Executive's authority to act and the need for courts to police those limits. We are not at war today, nor has any foreign government, including Venezuela, invaded the United States. Nevertheless, the President has proclaimed otherwise because TdA—supposedly a "hybrid criminal state"—"engage[s] in mass illegal migration to" and is involved in drug trafficking and other crime in the United States. Appl. App. 176a. For the President to invoke the AEA as a broad immigration or drug enforcement tool, and then to summarily detain and remove any individual it decides is connected to TdA, is a shocking misuse of emergency war powers that demands judicial scrutiny.[12]

[12] Given its haste, it is not surprising that the Applicants concede that they "lack a complete profile" or even "specific information about each individual" it has targeted for summary removal, meanwhile asserting that this lack of evidence somehow "demonstrates that they are terrorists." Appl. App. 161a. Distressingly, there are already reports that Venezuelan nationals who lack any connection to TdA have been removed under the AEA and sent to a prison camp in El Salvador. *See* Ex. 21 to Mot. for Prelim. Inj., ECF No. 67-21, *J.G.G. v. Trump,* No. 1:25-cv-00766 (D.D.C. Mar. 28, 2025).

If the Court vacates the Temporary Restraining Orders and allows the President to designate foreign nationals as enemy aliens without judicial oversight to ensure compliance with statutory limits, the President will be free to exercise unchecked power to remove groups of non-citizens perceived as enemies of the state. It is not difficult to foresee any number of scenarios that could result from these abuses, particularly with an Administration that broadly characterizes illegal crossings into the United States as "invasions." *See, e.g.*, *Protecting the American People Against Invasion*, Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025); *Clarifying the Military's Role in Protecting the Territorial Integrity of the United States*, Exec. Order No. 14167, 90 Fed. Reg. 8613 (Jan. 30, 2025). The Administration could wield the AEA to detain or remove immigrants from Middle Eastern countries by alleging (without evidence) ties to non-state terrorist groups. It could detain or remove immigrants from Mexico by alleging (again without evidence) affiliation with a drug cartel. While addressing national security and public safety threats related to immigration is important, doing so by invoking the AEA outside of wartime and claiming no judicial review of that invocation would gravely violate the separation of powers and damage the rule of law.

CONCLUSION

As conservatives, *Amici* espouse bedrock principles that include the rule of law, separation of powers, constitutional checks and balances, and protecting individual freedoms and liberties. Applicants' claim that their use of the AEA should be largely shielded from judicial scrutiny violates those principles and is ripe for abuse. It sets a dangerous course of unchecked Presidential power that endangers the liberties of every person in the United States and the foundational structure of our constitutional system. The Court should resist the Government's invitation to undermine our Constitution and should deny the Application.

April 1, 2025

Respectfully submitted,

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NAMES OF ADDITIONAL *AMICI CURIAE*

- Donald B. Ayer, Deputy Attorney General in the George H.W. Bush Administration from 1989 to 1990; Principal Deputy Solicitor General in the Reagan Administration from 1986 to 1988.

- Arne Carlson, Governor of Minnesota from 1991 to 1999 (R).

- Ty Cobb, Special Counsel to the President in the Trump Administration from 2017 to 2018.

- Barbara Comstock, Representative of the 10th Congressional District of Virginia from 2015 to 2019 (R).

- George Conway, Board President for the Society for the Rule of Law.

- Eric Edelman, Principal Deputy National Security Advisor to the Vice President in the George W. Bush Administration from 2001 to 2003; Under Secretary of Defense for Policy in the Bush Administration from 2005 to 2009.

- Mickey Edwards, Representative of the 5th Congressional District of Oklahoma from 1977 to 1993 (R).

- David Emery, Representative of the 1st Congressional District of Maine from 1975 to 1983 (R).

- John Farmer, New Jersey Attorney General from 1999 to 2002 (R); Assistant U.S. Attorney for the District of New Jersey from 1990 to 1994.

- John Giraudo, Attorney Advisor in the Department of Justice Office of Legal Counsel in the Reagan Administration from 1986 to 1989.

- Jim Greenwood, Representative of the 8th Congressional District of Pennsylvania from 1993 to 2005 (R).

- Michael Hayden, Director of the Central Intelligence Agency in the George W. Bush Administration from 2006 to 2009; Director of the National Security Agency appointed by President Bush from 1999 to 2005; General, United States Air Force.

- Bob Inglis, Representative of the 4th Congressional District of South Carolina from 1993 to 1999 and from 2005 to 2011 (R).

- Peter Keisler, Acting Attorney General in the George W. Bush Administration in 2007; Assistant Attorney General for the Civil Division in the Bush Administration from 2003 to 2007; Principal Deputy Associate Attorney General and Acting Associate Attorney General in the Bush Administration from 2002 to 2003; Assistant and Associate Counsel to the President in the Reagan Administration from 1986 to 1988.

- William Kristol, Chief of Staff to the Vice President in the George H.W. Bush Administration from 1989 to 1993.

- Philip Lacovara, Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office in the Nixon Administration from 1973 to 1974.

- Michael Luttig, Circuit Judge, United States Court of Appeals appointed by George H.W. Bush from 1991 to 2006; Assistant Attorney General, Office of Legal Counsel and Counselor to the Attorney General in the Bush Administration from 1990 to 1991; Assistant Counsel to the President in the Reagan Administration from 1981 to 1982.

- John McKay, U.S. Attorney for the Western District of Washington appointed by George W. Bush from 2001 to 2007.

- Tom Petri, Representative of the 6th Congressional District of Wisconsin from 1979 to 2015 (R).

- Carter Phillips, Assistant to the Solicitor General in the Reagan Administration from 1981 to 1984.

- Trevor Potter, Chairman of the Federal Election Commission and Commissioner of the Federal Election Commission from 1991 to 1995; General Counsel to John McCain's Presidential Campaign from 2000 to 2008.

- Thomas D. Rath, Attorney General of New Hampshire from 1978 to 1980 (R).

- Alan Charles Raul, Associate Counsel to the President in the Reagan Administration from 1986 to 1988.

- Stephen Richer, Maricopa County Recorder from 2021 to 2025 (R).

- Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security in the George W. Bush Administration from 2005 to 2009.

- Nicholas Rostow, Special Assistant to the President for National Security Affairs and Legal Adviser to the National Security Council under Reagan and George H.W. Bush Administrations from 1987 to 1993; Special Assistant to the Legal Adviser, U.S. Department of State from 1985 to 1987; Senior Research Scholar at Yale Law School.

- Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel in the Reagan Administration from 1981 to 1984.

- Christopher Shays, Representative for the 4th Congressional District of Connecticut from 1987 to 2009 (R).

- Fern Smith, Judge of the U.S. District Court for the Northern District of California appointed by President Reagan from 1988 to 2005.

- Peter Smith, Representative-at-Large of Vermont from 1989 to 1991 (R).

- William Joseph Walsh, Representative of the 8th Congressional District of Illinois from 2011 to 2013 (R).

- William F. Weld, U.S. Attorney for Massachusetts appointed by President Reagan from 1981 to 1986; Assistant U.S. Attorney General in charge of the Criminal Division appointed by President Reagan from 1986 to 1988; and Governor of Massachusetts from 1991 to 1997 (R).

- Christine Todd Whitman, Governor of New Jersey from 1994 to 2001 (R); Administrator of the Environmental Protection Agency in the George W. Bush Administration, 2001-2003.