VOLUME 139 MAY 2026 NUMBER 7

HARVARD LAW REVIEW

ARTICLE

HABEAS CLASS ACTIONS

Lee Kovarsky & D. Theodore Rave

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HABEAS CLASS ACTIONS

Lee Kovarsky[*] *& D. Theodore Rave*[**]

Can habeas corpus cases proceed as class actions? The Supreme Court has never squarely answered that question, even in cases where lower courts certified habeas classes. But the Trump Administration's wholesale push to expel noncitizens has forced the question to the center of modern civil rights litigation. And at least two Justices have expressed deep skepticism. This Article is the first modern work to consider the habeas class action thoroughly. Our conclusion: Applicable rules and statutes permit class treatment in appropriate habeas cases, when representative adjudication promotes efficiency and fairness.

While the Supreme Court has reserved the question, practice in the lower federal courts is uniform. We review and report on sixty years of habeas class adjudication in lower courts, starting with the 1966 introduction of Rule 23(b)(2) for classes seeking injunctive and declaratory relief. Our standout finding is that half of the geographic circuits have express precedent in favor of habeas class treatment, and the remainder favor it in practice. That is, every single federal appellate jurisdiction accepts habeas class treatment.

That decisional history figures into how courts should analyze applicable procedure in habeas cases. If a Federal Rule of Civil Procedure "conforms" to a history of habeas practice, then it applies of its own force. Courts also can — and do — look to the content of useful but "non-conforming" rules to craft analogous habeas procedure under other statutory authority, including the All Writs Act and the pertinent habeas corpus statute (28 U.S.C. § 2243). Whether Rule 23 is "conforming," and therefore applies of its own force, is a close question. Whether courts can apply the content of Rule 23 by force of other authority is not: Habeas cases with common issues are amenable to class adjudication.

In appropriate habeas cases, class treatment aligns with the purposes of representative litigation. Habeas classes can satisfy Rule 23 requirements, promote efficient adjudication of common issues, avoid inconsistent judgments, and defeat gamesmanship by defendants in more fragmented adjudication. And class treatment ensures adequate legal representation for vulnerable plaintiffs who would otherwise be unable to meaningfully assert their rights in court.

INTRODUCTION

Can prisoners litigate habeas corpus cases as class actions? This anodyne procedural question is an emergent civil rights dispute.[1]

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[*] Lee Kovarsky is a Visiting Professor of Law at Harvard Law School, as well as the Bryant Smith Chair in Law and Co-Director of the Capital Punishment Center at the University of Texas School of Law.

[**] D. Theodore Rave is the Bernard J. Ward Centennial Professor at the University of Texas School of Law. Thanks to Maureen Carroll, Lee Gelernt, Eric Freedman, Sam Issacharoff, David Marcus, Jim Pfander, Bill Rubenstein, and Adam Zimmerman for helpful comments and conversations. We thank Jack Goss, MaKenna McGraw, and Hayden Spurgeon for their research assistance throughout the project.

[1] In the interest of disclosure, we drafted, filed, and signed two amicus briefs in litigation challenging removal under the Alien Enemies Act (AEA), 50 U.S.C. §§ 21–24. *See* Brief of Amicus Curiae Class Action and Habeas Professors, W.M.M. v. Trump, 782 F. Supp. 3d. 370 (N.D. Tex. 2025) (No. 25-cv-00059-H), Dkt. No. 70 (filed May 13, 2025); Brief of Amicus Curiae Class Action and Habeas Professors, J.A.V. v. Trump, 781 F. Supp. 3d 535 (S.D. Tex. 2025) (No. 25-cv-00072), Dkt. No. 41 (filed Apr. 16, 2025).

Facing the Trump Administration's aggressive attempts to remove noncitizens under a wartime emergency statute,[2] the Supreme Court directed that noncitizens must use habeas proceedings to challenge their removal.[3] At roughly the same time, the Court disapproved of "universal injunctions" against unlawful government action, largely barring district courts from extending injunctive relief beyond what is necessary to protect party plaintiffs.[4]

For many noncitizens facing removal — most of whom have no practical ability to mount individual habeas challenges — the only workable protection is a habeas class action.[5] Understanding the stakes, district courts around the country have begun to certify habeas classes.[6] But, even as the Court has extinguished other anti-removal remedies, two Justices now argue that courts cannot certify habeas classes.[7] Justice Alito (joined by Justice Thomas) declared habeas class treatment to be "highly questionable," even "doubtful."[8] It is the now-urgent question of habeas class treatment that we explore here, and examples of Trump-era removal litigation enrich our discussion throughout.

Our conclusion is straightforward: Considering the pertinent statutes and rules, as well as the underlying purposes of representative litigation, courts should be able to certify habeas classes that present common legal questions. Idiosyncratic habeas law might sometimes mean that people with related habeas claims lack commonality sufficient for class treatment, but class actions are appropriate when enough commonality exists. The idea that habeas litigants cannot proceed as a class contravenes basic premises of the federal habeas corpus statute and the Federal Rules of Civil Procedure (FRCP).

We proceed in three Parts. Part I provides background, explaining how habeas class treatment became a flashpoint in one of this era's great civil rights struggles. Although the Supreme Court has formally reserved the question of whether habeas cases are eligible for class-wide

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[2] *See, e.g.*, DHS v. D.V.D., 145 S. Ct. 2153, 2153 (2025) (mem.) (granting emergency stay permitting removal of certain noncitizens to Libya); A.A.R.P. v. Trump, 145 S. Ct. 1364, 1370 (2025) (per curiam) (barring removal of putative class pending adjudication of sufficiency of notice and whether statutory basis is lawful); Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025) (ordering government to "facilitate" return of man mistakenly removed to El Salvador); Trump v. J.G.G., 145 S. Ct. 1003, 1005–06 (2025) (per curiam) (vacating temporary restraining orders (TROs), requiring challenges to certain removals to take place as habeas cases in place of confinement, and announcing reasonable notice requirement for removal under AEA).

[3] *See J.G.G.*, 145 S. Ct. at 1005.

[4] *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2548 (2025) (holding that universal injunctions "likely exceed the equitable authority" statutorily granted by Congress to the federal courts).

[5] We have made this point, in abbreviated form, in the popular press. *See* Lee Kovarsky & D. Theodore Rave, *Class Actions and the Alien Enemies Act*, LAWFARE (May 15, 2025, at 14:05 ET), https://www.lawfaremedia.org/article/class-actions-and-the-alien-enemies-act [https://perma.cc/X7KB-68W2].

[6] *See infra* notes 65–80 and accompanying text.

[7] *See A.A.R.P.*, 145 S. Ct. at 1375 (Alito, J., dissenting).

[8] *Id.*

adjudication,[9] the rest of the judiciary has a long history of habeas class certification.[10] Overstating the degree of lower court consensus is difficult: The six regional circuits to have formally reached the question all endorse habeas class treatment, and the remaining circuits embrace it in practice. It is only recent, auxiliary Supreme Court opinions, and those opinions alone, that form any basis for the legal "doubt[]" to which Justice Alito alluded.

In Part II, we explain and advocate the approach that courts have always used to decide what procedure applies in habeas cases: a conflict-of-laws analysis that looks to whether a generally applicable procedure is historically and practically compatible with habeas adjudication. Although habeas corpus proceedings are considered "civil" in a general sense, they are specialized proceedings not subject to all of the procedural rules that govern ordinary civil actions.[11] And Rule 81 of the FRCP sets forth the conflicts framework for deciding which procedures apply in habeas cases.[12]

Under Rule 81, and unless some specific statute (or bespoke habeas rule for postconviction cases) directs otherwise, courts *must* apply the FRCP to which habeas practice has historically "conformed."[13] If a particular rule (or some provision of it) does not "conform[]," however, then courts *may* still apply that rule's *content* "by analogy," under other statutory authority.[14] When courts have deemed the class action rule (Rule 23 of the FRCP) to be nonconforming and therefore inapplicable of its own force, they have long applied its *content* analogically and by force of either the All Writs Act[15] (AWA) or a remedial provision of the federal habeas statute.[16] Justice Alito has simply mistaken Rule 81 as a restriction on when class actions are permitted, rather than as a rule about when they are required.[17]

In Part III, we establish crucial propositions favoring representative habeas litigation featuring shared challenges to common aspects of

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[9] *See* Schall v. Martin, 467 U.S. 253, 261 n.10 (1984) ("[W]e have no occasion to reach the question.").

[10] *See infra* notes 102–127 and accompanying text.

[11] *See* Harris v. Nelson, 394 U.S. 286, 293–94 (1969) (citing Fisher *ex rel.* Barcelon v. Baker, 203 U.S. 174, 181 (1906)).

[12] *See* FED. R. CIV. P. 81(a)(4).

[13] *See id.*

[14] *Harris*, 394 U.S. at 294, 299; *see also infra* section II.A, pp. 1519–25 (explaining conflicts analysis under FED. R. CIV. P. 81(a)(4)).

[15] 28 U.S.C. § 1651.

[16] 28 U.S.C. § 2243; *see infra* section II.B.2, pp. 1527–30 (All Writs Act); section II.B.3, pp. 1530–32 (habeas provision); *see also* Bracy v. Gramley, 520 U.S. 899, 904 (1997) (reaffirming this reading of *Harris*).

[17] *Compare* A.A.R.P. v. Trump, 145 S. Ct. 1364, 1376 (2025) (Alito, J., dissenting) (erroneously describing FRCP 23 as a "limit[]" that would be "circumvent[ed]" by recourse to another source of power), *with infra* section II.A, pp. 1519–25 (explaining that FRCP 81(a)(4) has historically been understood to permit analogical applications of Civil Rules' content even when the content is not required by the Rules themselves).

broad detention policies. Habeas class treatment is often desirable because it promotes efficiency and distributive fairness.[18] It also fits comfortably within the tradition and basic purposes of Rule 23(b)(2), which, since 1966, has governed representative litigation seeking injunctive and declaratory relief.[19] A Rule 23(b)(2) class action is appropriate when a single order can provide indivisible relief on a legal issue shared across a plaintiff class,[20] such as when a group of noncitizens brings identical legal challenges to the same removal policy.[21]

Our purpose is not to urge an outcome in a specific piece of litigation, although our conclusions have obvious real-world implications. Instead, and in the spirit of academic inquiry, we offer thorough histories of habeas class adjudication and the conflict-of-laws approach used to specify habeas procedure. Those histories capture a clear framework for deciding when representative adjudication is lawful in habeas cases. Candidly, we were surprised by the one-sidedness of lower court class action history. With only very minor caveats, every court to have considered the question has determined that habeas cases are eligible for class action treatment.[22]

Considering this pattern alongside the animating purposes of Rule 23(b)(2), we can find no serious argument that Rule 81 — or anything else — excludes habeas class treatment. Class action adjudication remains appropriate when habeas challenges raise common questions and when the ordinary rules for class actions are otherwise satisfied. Those conditions won't always exist; postconviction challenges, in particular, will often turn on individual procedural or substantive issues not suited to class treatment.[23] But habeas class actions can be an important tool in disputes over things like immigration and pretrial custody, where large groups of detainees challenge the legality of detention policies across the board.[24]

I. THE "CONTROVERSY"

Part I explains the "controversy," as it were. The Supreme Court has never formally decided whether a habeas case can proceed as a class action,[25] but there is more than a half-century history of lower court habeas class adjudication. Over that period, the regional circuits have

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[18] *See infra* section III.A, pp. 1536–41.

[19] *See* FED. R. CIV. P. 23(b)(2); *see also* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 857–60 (2016) (describing historical backdrop for adoption of Rule 23(b)(2)).

[20] *See infra* section III.B.2, pp. 1547–52.

[21] *See infra* notes 296–309 and accompanying text.

[22] *See infra* section I.B, pp. 1512–17.

[23] *See, e.g.*, Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 417 n.188 (2007) (citing Strickland v. Washington, 466 U.S. 668, 697 (1984)) (postconviction assertion of ineffective assistance of counsel turns on individual showing of prejudice).

[24] *See infra* notes 106–127 and accompanying text.

[25] *See* Schall v. Martin, 467 U.S. 253, 261 n.10 (1984).

unanimously embraced habeas class treatment.[26] Our objectives in Part I are therefore twofold. First, we explain why habeas class adjudication has become the subject of a major civil rights dispute. Second, and to lay the groundwork for the positions we take in Parts II and III, we report the near-unanimous decisional practice in the lower courts. Before that, though, a brief word on what habeas corpus writs and class actions *are*.

The writ of habeas corpus forces judicial review of custody.[27] The Constitution guarantees the habeas "[p]rivilege," except when Congress suspends it during periods of rebellion or invasion.[28] The Judiciary Act of 1789[29] first codified the writ in a statute.[30] After the Habeas Corpus Act of 1867,[31] any state or federal prisoner could mount a habeas challenge[32] — to things like criminal sentences, immigration custody, and pretrial detention.[33] Congress added legislative restrictions over time, especially on habeas challenges to criminal sentences.[34] All habeas claims allege that custody is unlawful in some respect, often because it lacks authorization or is procedurally defective.[35] Discharge is the typical habeas remedy, but relief can also do other things, like enjoin executions or bar immigration removal.[36]

Class actions are a form of representative litigation in which a named party litigates on behalf of a class of similarly situated plaintiffs. While representative litigation has deep historical roots,[37] Rule 23 sets forth the modern criteria for class treatment in the federal courts, which generally require a common question that can be decided for a large group,

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[26] *See infra* notes 109–130 and accompanying text.

[27] *See generally* BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 1–110 (2d ed. 2024) (providing historical overview and explaining constitutional structure of privilege); 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3 (7th ed. 2025) (summarizing "[t]he broad rhetoric and applications of the writ").

[28] *See* U.S. CONST. art. I, § 9, cl. 2.

[29] Ch. 20, 1 Stat. 73.

[30] *See* § 14, 1 Stat. at 81–82.

[31] Ch. 28, 14 Stat. 385.

[32] *Id.*

[33] *See* GARRETT & KOVARSKY, *supra* note 27, at 111–506, 507–80, 593–95.

[34] *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (adding several restrictions on postconviction relief for state and federal prisoners).

[35] *See* Lee Kovarsky, *The New Negative Habeas Equity*, 137 HARV. L. REV. 2222, 2265 (2024) (recounting how "all cases" in seventeenth-century England concerned "whether arrest and detention were legally authorized" and "complied with certain procedures"); *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1079–80 (1970) ("The writ lies to examine the lawfulness of the custody . . . .").

[36] *See, e.g.*, Trump v. J.G.G., 145 S. Ct. 1003, 1005 (2025) (per curiam) (underscoring that habeas relief could bar removal); Wiggins v. Smith, 539 U.S. 510, 516, 519 (2003) (ordering habeas relief for capital sentence).

[37] *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (describing history of representative litigation); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 217–18 (1990) (reviewing YEAZELL, *supra*).

as well as a class representative with typical claims who will adequately represent the absent class members.[38] Some certification criteria depend on the relief requested,[39] but the basic idea is that representative litigation is efficient, avoids inconsistent judgments, and protects vulnerable people who might otherwise lack legal representation.[40]

These are high-level summaries of the habeas writ and class actions, but they suffice for now. To the extent that readers require more information to track our arguments, we supply it alongside the argumentation itself. The important points at this juncture are that (1) the habeas writ allows prisoners to contest the lawfulness of custody, and (2) the class action is a device by which they may do so collectively.

A. The AEA and the Brewing Controversy

Until recently, the issue of habeas class treatment didn't have a political salience that demanded Supreme Court attention. The lower courts have been certifying habeas class actions for decades, and, although the Supreme Court has reviewed many of those cases, it has never taken the opportunity to formally decide whether habeas class treatment is permitted. In a footnote in *Harris v. Nelson*,[41] a 1969 case about the applicability of the FRCP's discovery rules,[42] the Court first reserved the question of whether Rule 23 applied in habeas cases.[43] In *Middendorf v. Henry*,[44] a 1976 case in which plaintiffs challenged summary court-martial convictions obtained in the absence of counsel, the Supreme Court had "no occasion to reach the question of whether . . . [Rule] 23, providing for class actions, is applicable to petitions for habeas corpus."[45] *Schall v. Martin*[46] was a 1984 case involving pretrial detention of juvenile offenders,[47] and it too included a footnote stating that it had "no occasion" to decide "whether . . . [Rule] 23, providing for class actions, is applicable to petitions for habeas corpus relief."[48] In *Jennings v. Rodriguez*,[49] a 2018 decision about bond practices in immigration cases,[50] Justice Thomas wrote a concurrence that

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[38] *See* FED. R. CIV. P. 23(a) (setting forth prerequisites for certification of all class actions).
[39] *See* FED. R. CIV. P. 23(b) (setting forth additional criteria for particular class types).
[40] *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 29–30 & nn.100–03 (2000) (collecting sources).
[41] 394 U.S. 286 (1969).
[42] *See id.* at 290.
[43] *See id.* at 295 n.5.
[44] 425 U.S. 25 (1976).
[45] *Id.* at 30.
[46] 467 U.S. 253 (1984).
[47] *Id.* at 255.
[48] *Id.* at 261 n.10.
[49] 138 S. Ct. 830 (2018).
[50] *Id.* at 836.

flagged the issue's undecided status in a footnote.[51] None of the other Justices in *Jennings* commented on the issue.

Between *Middendorf* and the *Jennings* footnote, it's not just that all lower court jurisdictions used class actions to adjudicate habeas cases.[52] On several occasions, the Supreme Court itself assumed without deciding the availability of habeas class treatment. The order in *Jennings* (authored by Justice Alito), for instance, was a remand for the lower court to determine whether the habeas class should be certified under Rule 23(b)(2).[53] In *Nielsen v. Preap*,[54] the Court held that the class action was not moot even though "the named plaintiffs obtained some relief before class certification."[55] These decisions do not contain holdings that class treatment is appropriate in habeas cases, but they show awareness of, and at least some tacit acquiescence to, the class action practices that dominate the lower courts.[56]

Things began to change at the beginning of the second Trump Administration, which aggressively pushed to detain and remove noncitizens.[57] One of the highest profile initiatives was the Administration's invocation of the Alien Enemies Act[58] (AEA), a 1798 statute permitting a president, under certain circumstances, to remove foreign nationals during a military conflict.[59] Specifically, a president can order noncitizens from the adversary nation removed during "a declared war" with, or "invasion or predatory incursion" by, a "foreign nation or government."[60] After activating the AEA by way of presidential proclamation,[61] the Trump Administration attempted to remove several hundred Venezuelan nationals, alleging them to be members of Tren de Aragua

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[51] *Id.* at 858 n.7 (Thomas, J., concurring in part and concurring in the judgment) ("This Court has never addressed whether habeas relief can be pursued in a class action. I take no position on that issue here . . . ." (citation omitted)).

[52] *See infra* notes 97–127 and accompanying text.

[53] *See Jennings*, 138 S. Ct. at 836, 851.

[54] 139 S. Ct. 954 (2019).

[55] *Id.* at 962–63.

[56] *See infra* notes 97–127 and accompanying text.

[57] *See generally* Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 29, 2025) (mapping the Administration's immigration priorities); Yan Zhuang & Tim Balk, *A Timeline of Legal Battles Over Trump's Use of the Alien Enemies Act*, N.Y. TIMES (Sep. 3, 2025), https://www.nytimes.com/2025/04/19/us/politics/alien-enemies-act-timeline.html [https://perma.cc/JL2Z-LLKV] (reporting on administration's rollout of AEA removals); Michelle Hackman & Victoria Albert, *New ICE Policy Blocks Detained Migrants from Seeking Bond*, WALL ST. J. (July 15, 2025, at 14:58 ET), https://www.wsj.com/politics/policy/new-ice-policy-blocks-detained-migrants-from-seeking-bond-f557402a [https://perma.cc/9ZLW-Q9T5] (discussing harsher bond policy); Sammy Westfall, *Trump Expands "Third Country" Deportation Policy to Ghana*, WASH. POST (Sep. 11, 2025), https://www.washingtonpost.com/world/2025/07/15/trump-third-countries-migrants-deportation [https://perma.cc/9ADE-SNS6] (reporting on the Administration's attempts to send migrants to non-originating countries).

[58] Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24).

[59] *Id.*

[60] *Id.* § 21.

[61] Proclamation No. 10,903, 90 Fed. Reg. 13033 (Mar. 20, 2025).

(TdA), a prison gang that the Administration characterized as the Venezuelan government's alter ego.[62]

The responsive litigation generated numerous questions that were common to all AEA detainees. Here are five: (1) whether Trump's AEA proclamation was invalid because there was no "invasion" or "predatory incursion"; (2) whether the proclamation was invalid because TdA is not an official arm of the Venezuelan government; (3) whether the proclamation unlawfully circumvented other statutory immigration restrictions; (4) whether the government had to provide torture screenings before AEA removal; and (5) what degree of pre-removal notice the Constitution required, if any.[63] Civil rights attorneys quickly moved for class certification on some combination of these grounds.[64]

The most robust attempt at class certification was in the U.S. District Court for the District of Columbia. In a case captioned *J.G.G. v. Trump*,[65] the ACLU moved to certify a nationwide class of AEA detainees.[66] When the Administration appealed preliminary relief against it, the Supreme Court did not reach the issue of class certification. It instead focused on venue, holding that the case had to go forward as habeas litigation in the Southern District of Texas, where the named plaintiff was confined.[67] In *J.G.G.*, however, the Court held that AEA "detainees [we]re entitled to notice and opportunity to be heard" before removal,[68] and that such "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."[69] Following the Supreme Court's order in *J.G.G.*, the AEA litigation fragmented into a district-by-district affair.[70]

After *J.G.G.*, the Trump Administration took an extreme position on the notice required before removal. According to public filings, it was furnishing AEA detainees who didn't speak English with English-only

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[62] *See* Sarah Kinosian, Kristina Cooke & Ted Hesson, *Insight: Trump Deported 238 Venezuelans to El Salvador. Dozens Have Active Asylum Cases*, REUTERS (Apr. 1, 2025, at 12:12 ET), https://www.reuters.com/world/americas/trump-deported-238-venezuelans-el-salvador-dozens-have-active-asylum-cases-2025-04-01 [https://perma.cc/FK3U-L4FF].

[63] *See* Kovarsky & Rave, *supra* note 5.

[64] *See id.*

[65] 786 F. Supp. 3d 37 (D.D.C. 2025).

[66] *See* Plaintiffs' Motion for Class Certification with Supporting Points and Authorities at 1, 9, *J.G.G.*, 786 F. Supp. 3d 37 (D.D.C. 2025) (No. 25-cv-00766), Dkt. No. 4 (filed Mar. 15, 2025).

[67] *See* Trump v. J.G.G., 145 S. Ct. 1003, 1006 (2025) (per curiam).

[68] *Id.*

[69] *Id.*

[70] A class of detainees that had already been removed to El Salvador moved for class certification in the U.S. District Court for the District of Columbia. *See* Petitioners-Plaintiffs' and Plaintiffs' Motion for Class Certification and Appointment of Class Counsel at 1 & n.1, *J.G.G.*, 786 F. Supp. 3d 37 (D.D.C. 2025) (No. 25-cv-00766), Dkt. No. 103 (filed Apr. 25, 2025).

notices.[71] The notices didn't tell detainees that, when, or how they could challenge their removal.[72] The Administration planned to remove detainees who didn't declare an intent to file habeas petitions within twelve hours of notice, and to remove those declaring intent but not actually filing petitions within twenty-four hours.[73] Although immigration authorities permitted attorney visits for detainees whom counsel could identify in advance, they refused to provide information that would enable access to others.[74] According to the ACLU, lead counsel in many of the AEA cases, not one AEA detainee has been able to file a habeas petition without the assistance of counsel.[75]

A federal district court judge subsequently certified a class in the Southern District of Texas,[76] which contained the largest post-*J.G.G.* population of AEA detainees. The ACLU also filed a habeas challenge in the Northern District of Texas, initially captioned *A.A.R.P. v. Trump*.[77] In *A.A.R.P.*, available information indicated that ICE was busing AEA detainees from other jurisdictions into the Northern District, where the Administration likely expected a more favorable judicial reaction and was staging the detainees for imminent removal.[78] At 12:52 AM on April 19, 2025, the Supreme Court issued an unprecedented injunction barring the removal of "any member of the putative class of detainees from the United States until further order of this Court."[79] While *A.A.R.P.* was pending at the Supreme Court, the district judge in the Northern District of Texas denied class certification.[80]

As the *A.A.R.P.* controversy was unfolding, the Supreme Court heard oral argument in *Trump v. CASA, Inc.*,[81] a case about the validity of universal injunctions to contest Trump-era citizenship policies.[82] Several Justices punctuated oral argument with the observation that the class action mechanism could reproduce the function of universal

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71 *See* Memorandum in Support of Petitioners-Plaintiffs' Motion to Reconsider or, in the Alternative, to Certify a Class Under Rule 23(c)(4) at 3, W.M.M. v. Trump, 782 F. Supp. 3d 370 (N.D. Tex. 2025) (No. 25-00059-H), Dkt. No. 68-1 (filed May 13, 2025) [hereinafter *W.M.M.* Reconsideration Motion].

72 *See id.*

73 *See* Declaration of Assistant Field Office Director at 4, *W.M.M.*, 782 F. Supp. 3d 370 (No. 25-00059-H), Dkt. No. 55-1 (filed Apr. 29, 2025).

74 *See W.M.M.* Reconsideration Motion, *supra* note 71, at 2.

75 *See id.* at 3.

76 *See* Order and Opinion Granting Motion to Certify Class at 1, J.A.V. v. Trump, 781 F. Supp. 3d 535 (S.D. Tex. 2025) (No. 25-cv-00072), Dkt. No. 57 (filed May 1, 2025).

77 *See* Complaint-Class Action: Class Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 20, A.A.R.P. v. Trump, 778 F. Supp. 3d 882 (N.D. Tex. 2025) (No. 25-cv-00059-H), Dkt. No. 1 (filed Apr. 16, 2025) [hereinafter *A.A.R.P.* Complaint].

78 *See* A.A.R.P. v. Trump, 145 S. Ct. 1364, 1366–67 (2025) (per curiam).

79 A.A.R.P. v. Trump, 145 S. Ct. 1034, 1034 (2025) (mem.).

80 *See A.A.R.P.*, 145 S. Ct. at 1369 n.1. We explain why the district court's denial of class certification was misguided in Kovarsky & Rave, *supra* note 5.

81 145 S. Ct. 2540 (2025).

82 *See* Transcript of Oral Argument at 4–5, *CASA*, 145 S. Ct. 2540 (No. 24A884), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24a884_7lhn.pdf [https://perma.cc/N692-BDL8].

injunctions.[83] Days later, the opinion on preliminary relief in *A.A.R.P.* came down, with the Supreme Court sending the case back to the Fifth Circuit to adjudicate, among other things, the sufficiency of notice.[84] In ruling for the detainees, the majority vacated the district court order denying class certification and held that it could "properly issue temporary injunctive relief to the putative [habeas] class in order to preserve our jurisdiction pending appeal."[85] *A.A.R.P.* formally held only that temporary class treatment was appropriate to protect notice-and-opportunity rights necessary to litigate habeas cases,[86] but the distinction between class treatment of *those* rights and class treatment of the underlying detention challenges is one without a material difference.

Justice Alito's *A.A.R.P.* dissent, joined by Justice Thomas, staked out a position that dramatically raised the salience of the class action question. Justice Alito began: "[I]t is doubtful that class relief may be obtained in a habeas proceeding. We have never so held, and it is highly questionable whether it is permitted."[87] He discussed Rule 81(a)(4) and *Harris*, explaining (correctly) that Rule 33, a discovery rule about interrogatories, did not apply in habeas proceedings.[88] He then argued that "[t]here are similar reasons to believe that Rule 23, which authorizes class actions, is not applicable in habeas."[89] There are two pieces of Justice Alito's dissent that merit brief explanation here.

First, Justice Alito asserted that there is no "historical support for the practice" of habeas class treatment.[90] To substantiate that assertion, he cited only two anonymous pieces in the *Harvard Law Review* from more than fifty-five years ago: a student note from 1968 and a summative "Developments in the Law" feature from 1970.[91] Leaning on those two sources and those two sources alone, he edited out the half century of habeas class treatment that we summarize in section I.B. We believe that history speaks for itself.

Second, Justice Alito addressed situations in which lower courts had permitted class treatment by force of some authority other than Rule 23.[92] He wrote: "Where a particular rule does not apply in habeas, a court cannot circumvent that limitation by simply saying that it is importing the same feature under a different rubric."[93] Justice Alito

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[83] *See, e.g.*, *id.* at 29 (question of Kagan, J.); *id.* at 32, 66, 115 (questions of Barrett, J.); *id.* at 51, 131, 136 (questions of Kavanaugh, J.); *id.* at 133 (question of Gorsuch, J.).

[84] *See A.A.R.P.*, 145 S. Ct. at 1370.

[85] *Id.* at 1369.

[86] *See id.* at 1368, 1369 n.1.

[87] *Id.* at 1375 (Alito, J., dissenting).

[88] *See id.*

[89] *Id.*

[90] *Id.*

[91] *See id.* (quoting Note, *Multiparty Federal Habeas Corpus*, 81 HARV. L. REV. 1482, 1493 (1968); *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1170 (1970)).

[92] *See id.* at 1375–76.

[93] *Id.* at 1376.

thereby framed Rule 81(a)(4) inaccurately as a rule about when class action treatment is categorically barred. If a Federal Rule of Civil Procedure "does not apply in habeas," it is because it is insufficiently conforming under Rule 81(a)(4).[94] But Rule 81 does not "limit" habeas practice to sufficiently conforming rules.[95] Courts are free to apply the *content* of an insufficiently conforming FRCP under other statutory authority — namely the AWA and the habeas statute (§ 2243).[96] As we show in section II.A, this understanding of Rule 81(a)(4) should not be subject to reasonable disagreement.

B. The History of Habeas Class Actions

Although the Supreme Court has never confronted the question head-on, the lower federal courts have been certifying habeas class actions for more than fifty years. To get a handle on the history, we reviewed thousands of federal cases including the words "habeas" and "class actions" since 1969.[97] Our standout research finding has significant implications for the normative arguments we make later. When we looked systematically at lower court practice, we discovered a remarkable, unbroken history of habeas class adjudication. That history belies assertions that the practice has been contested or controversial, and it supports class treatment under or by analogy to the FRCP.

The modern era began in 1966, when the major Rule 23 amendments went into effect.[98] The revised Rule 23 included a provision for Rule 23(b)(2) classes seeking indivisible remedies like injunctions and declaratory relief.[99] Almost immediately, parties sought to use the new rule to obtain class treatment in habeas cases. In 1968, the NAACP Legal

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[94] *Id.*; *see id.* at 1375. We refer to whether the FRCP are "sufficiently conforming," with the reference to conforming practice appearing in Rule 81(a)(4)(B). Formally, that provision refers to habeas practice that sufficiently "conformed to the practice in civil actions." FED. R. CIV. P. 81(a)(4)(B). Because "habeas practice that conformed to civil practice" is logically the same as "civil practice that conformed to habeas practice," and in the interest of clarity, we simply refer to "sufficiently conforming Rules."

[95] *See* FED. R. CIV. P. 81(a)(4) (specifying conditions for mandatory application).

[96] *See infra* sections II.B.2–3, pp. 1527–32. The Supreme Court has reaffirmed this reading of *Harris*, which is in turn a reading of Rule 81. In *Bracy v. Gramley*, 520 U.S. 899 (1997), the Court documented the development of a specialized habeas discovery rule. *See id.* at 904. In so doing, it recited its understanding of *Harris* as a holding about the power to develop similar procedure under the AWA and habeas power: "[T]he 'broad discovery provisions' of the Federal Rules of Civil Procedure did not apply in habeas proceedings . . . [, but] the All Writs Act gave federal courts the power to 'fashion appropriate modes of procedure,' including discovery, to dispose of habeas petitions 'as law and justice require.'" *Id.* (citations omitted) (quoting Harris v. Nelson, 394 U.S. 286, 295, 299, 300 (1969)).

[97] In addition to the leading decisions in circuits with an express rule embracing habeas class actions, we reviewed 1,988 lower court cases in "de facto" jurisdictions that lacked a precedential circuit court decision formally embracing habeas class actions. *See infra* note 116 and accompanying text.

[98] *See* David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang, *1953–1980*, 90 WASH. U. L. REV. 587, 588 (2013).

[99] FED. R. CIV. P. 23(b)(2).

Defense Fund obtained class certification in habeas litigation challenging Florida's death penalty.[100] Shortly thereafter, in 1969, *Harris v. Nelson* fixed the modern conflict-of-laws approach for deciding, under Rule 81, which parts of the FRCP apply in habeas cases.[101]

Harris dealt with the applicability of the discovery rules, but the Court commented on class actions in footnote dicta. Citing both the Florida class action and a student note discussing less than two years of lower court activity since Rule 23(b)(2) came into existence, *Harris* footnote five observed: "The applicability to habeas corpus of the rules concerning joinder and class actions has engendered considerable debate."[102] Our extensive case review reveals that, after the Court decided *Harris*, any "debate" disappeared for about fifty years.[103]

The pivotal moment for habeas class treatment arrived in 1974, when the Second Circuit decided *United States ex rel. Sero v. Preiser*.[104] *Sero* determined that Rule 23 did not apply of its own force to habeas proceedings.[105] Following *Harris*, *Sero* nonetheless held that class action treatment was appropriate because the *content* of Rule 23 applied analogically, by force of the AWA.[106] *Sero*, which involved a habeas challenge to young adult sentencing practices,[107] remains the most heavily cited case on the habeas-class-treatment question.[108]

During the 1970s, five circuits (including the Second Circuit in *Sero*) held that class treatment was appropriate for habeas cases, and the D.C.

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[100] *See* Adderly v. Wainwright, 46 F.R.D. 97, 99 (M.D. Fla. 1968). There was a pre-*Adderly* case refusing class treatment of a habeas challenge to the California death penalty, but the district court decided there was too much issue variation in the case. *See* Hill v. Nelson, 272 F. Supp. 790, 794 (N.D. Cal. 1967) ("We do not say that a class action for a writ of habeas corpus could never under any circumstances be maintained but determine at this time that because of the procedural problems inherent in this proceeding, use of such a class suit does not appear the most practicable vehicle to determine the issues presented."). There was also a pre-*Adderly* challenge by those in a Baltimore jail in which the court stated "it is not at all clear" whether the FRCP applies in habeas cases, but the court didn't reach the question. *See* Mitchell v. Schoonfield, 285 F. Supp. 728, 729 (D. Md. 1968).

[101] 394 U.S. at 293.

[102] *Id.* at 294 n.5 (citing, inter alia, Adderly v. Wainwright, 272 F. Supp. 530 (M.D. Fla. 1967); Note, *supra* note 91).

[103] Before the decisional activity recounted below, the *Adderly* court reaffirmed the propriety of class action treatment. *See* Adderly v. Wainwright, 58 F.R.D. 389, 401 (M.D. Fla. 1972) (reaffirming Furman v. Georgia, 408 U.S. 238 (1972)).

[104] 506 F.2d 1115 (2d Cir. 1974).

[105] *Id.* at 1125 (holding that there is "compelling justification for allowing a multi-party proceeding similar to the class action authorized by the [FRCP]").

[106] *Id.*

[107] *Id.* at 1118.

[108] *Cf.* Burk v. Rios, No. 25-CV-199, 2025 WL 2524138, at *2 (W.D. Tex. Sep. 3, 2025) ("[Many] circuit courts have found *Sero* persuasive and have recognized the availability of procedures analogous to Rule 23 classes in habeas action proceedings.").

Circuit joined them in 1996.[109] These six circuits affirmed habeas class adjudication of, among other things, the sufficiency of parole consideration,[110] the quality of medical and psychiatric treatment of prisoners committed to a federal medical facility,[111] access to legal materials necessary to litigate cases,[112] the constitutionality of a statute committing minors to indefinite supervision,[113] and the legality of the U.S. extradition statutes.[114] Courts have continued to certify habeas classes that present common questions for adjudication, such as the legality of bonding protocols and COVID-19 mitigation.[115]

Even in the six regional circuits *without* binding precedent squarely endorsing habeas class treatment (de facto jurisdictions), the device has an impressive pedigree. From these jurisdictions, we reviewed the 1,988 opinions and orders that contain the words "habeas" and "class action."[116] There is not a single appellate decision disputing that class treatment is available in appropriate habeas cases, and the pertinent dicta sit on a spectrum between neutrality and nonbinding approval.[117]

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109 *See Sero*, 506 F.2d at 1125; Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975) (endorsing "representative procedure analogous to the class action provided for in Rule 23"); Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973) (rejecting that "a class action is never appropriate in a habeas corpus proceeding"); Mead v. Parker, 464 F.2d 1108, 1112 (9th Cir. 1972) ("Nor can we agree that a petition for a writ of habeas corpus can never be treated as a class action."); Napier v. Gertrude, 542 F.2d 825, 827 & n.2 (10th Cir. 1976) (approving "class treatment," *id.* at 827, in habeas cases); LoBue v. Christopher, 82 F.3d 1081, 1085 (D.C. Cir. 1996) ("If by that he meant to claim that there is no equivalent to class actions in habeas, he was wrong, for courts have in fact developed such equivalents."). We were conservative in characterizing circuit court precedent holding habeas class actions appropriate. The Third Circuit, for example, affirmed habeas class treatment in an immigration bonding case, but did not include language squarely endorsing habeas class actions. *See* Alli v. Decker, 650 F.3d 1007, 1016 (3d Cir. 2011). Accordingly, we characterize the Third Circuit as a de facto jurisdiction.

110 *See Bijeol*, 513 F.2d at 966–67.

111 *See Williams*, 481 F.2d at 359.

112 *See Mead*, 464 F.2d at 1110.

113 *See Napier*, 542 F.2d at 826.

114 *See LoBue*, 82 F.3d at 1081–82.

115 *See, e.g.*, Alli v. Decker, 650 F.3d 1007, 1009, 1016 (3d Cir. 2011) (affirming class treatment in immigration bonding case); Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 415, 452 (D. Conn. 2020) (holding that habeas class in COVID-19 litigation would likely be certified); Zepeda Rivas v. Jennings, 445 F. Supp. 3d 36, 38 (N.D. Cal. 2020) (provisionally certifying habeas class in COVID-19 litigation); Ali v. Ashcroft, No. C02-2304, 2002 WL 35650202, at *1, *3 (W.D. Wash. Dec. 10, 2002) (certifying habeas class to challenge removal of Somali plaintiffs).

116 Specifically, we reviewed opinions and orders following March 24, 1969, the date the Supreme Court decided *Harris v. Nelson*.

117 *See, e.g.*, Brito v. Garland, 22 F.4th 240, 252 (1st Cir. 2021) (indicating that habeas class can seek declaratory relief); Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994) ("[T]here is some authority that would allow class-wide *habeas* relief . . . ."); *Alli*, 650 F.3d at 1009, 1016 (permitting habeas class action for declaratory relief on question of right to bond determinations); Guzman Chavez v. Hott, 940 F.3d 867, 882 (4th Cir. 2019) (granting habeas relief to noncitizen class seeking individualized bond hearings in immigration cases), *rev'd on other grounds sub nom.*, Johnson v. Guzman Chavez, 141 S. Ct. 2271 (2021); St. Jules v. Savage, 512 F.2d 881, 882 & n.2 (5th Cir. 1975) (remanding habeas class action challenge to Texas enhancement statute with footnote expressing no opinion

It is the district courts, however, where one sees the pervasiveness of habeas class treatment in de facto jurisdictions.[118] District courts in these circuits certified class actions challenging various forms of immigration detention and classification,[119] noncitizen removal,[120] denial of counsel for indigent detainees,[121] material witness detention,[122] vagrancy ordinances,[123] bonding practices,[124] conditions of confinement,[125] and COVID-19 mitigation shortfalls.[126] Out of the almost two thousand

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on "propriety of the class action," *id.* at 882 n.2); Browne v. Estelle, 544 F.2d 1244, 1245 (5th Cir. 1977) (appearing to permit habeas class action challenge to recidivism statute for claimants who exhaust state remedies); Hamama v. Adducci, 912 F.3d 869, 879 (6th Cir. 2018) ("[T]here is nothing barring a class from seeking a traditional writ of habeas corpus . . . ."); Busby v. Bonner, No. 21-5853, 2022 WL 17661145, at *9 (6th Cir. Dec. 14, 2022) (enforcing consent decree in class action habeas case); Tefel v. Reno, 180 F.3d 1286, 1305 (11th Cir. 1999) (remanding habeas case for class action determination).

118 *See, e.g,*. cases cited *infra* notes 119 to 126; Yang v. Reno, 852 F. Supp. 316, 326 (M.D. Pa. 1994) ("There is some authority to suggest that class-wide habeas relief may be appropriate in some circumstances."), *aff'd sub nom.*, *Yi*, 24 F.3d 500; Knight v. Sheriff of Leon Cnty., 369 F. Supp. 3d 1214, 1223 (N.D. Fla. 2019) ("Federal Rule of Civil Procedure 23 does not apply to habeas proceedings. But as a matter of discretion, a court may certify a habeas class on analogous grounds.").

119 *See, e.g.*, Gayle v. Warden Monmouth Cnty. Corr. Inst., No. 12-cv-02806, 2017 WL 5479701, at *1 (D.N.J. Nov. 15, 2017) (certifying habeas class to challenge designation as mandatory immigration detainees); Fernandez-Roque v. Smith, 91 F.R.D. 117, 122 n.3 (N.D. Ga. 1981) ("There is authority for the proposition that class actions may be maintained in habeas corpus cases, and in immigration cases."); Mir v. Smith, 521 F. Supp. 446, 448 (N.D. Ga. 1981) (discussing class action for Cuban nationals in Atlanta Federal Penitentiary who arrived as part of the 1980 "Freedom Flotilla").

120 *See, e.g.*, Ibrahim v. Acosta, 326 F.R.D. 696, 702 (S.D. Fla. 2018) (certifying class challenging removal of Somali nationals); Louis v. Meissner, 532 F. Supp. 881, 884 (S.D. Fla. 1982) (affording class treatment to Haitian nationals claiming unlawful removal process).

121 *See, e.g.*, *In re* Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the W. Dist. of Tex., 612 F. Supp. 940, 942 (W.D. Tex. 1985) (ordering habeas class relief involving appointment of counsel for undocumented entrants detained under federal material witness statute).

122 *See, e.g.*, Aguilar-Ayala v. Ruiz, 973 F.2d 411, 421–23 (5th Cir. 1992) (including as appendix the district court order using habeas class treatment to manage material witness detention).

123 *See, e.g.*, Cantrell v. Folsom, 332 F. Supp. 767, 769 (M.D. Fla. 1971) (permitting class habeas challenge to vagrancy ordinance).

124 *See, e.g.*, Diaz v. Hott, 297 F. Supp. 3d 618, 628 (E.D. Va. 2018) (certifying habeas class of immigration detainees challenging defects in bond practices); Reid v. Donelan, No. 13-30125, 2018 WL 5269992, at *8 (D. Mass. Oct. 23, 2018) (same); Gordon v. Johnson, 300 F.R.D. 28, 30 (D. Mass. 2014) (same); *see also* Hamama v. Adducci, No. 17-cv-11910, 2018 WL 11361946, at *8 (E.D. Mich. Sep. 26, 2018) (certifying nationwide class challenge to removal before Hamama v. Adducci, 912 F.3d 869 (6th Cir. 2018), held that the specific category of immigration challenge couldn't receive class treatment, *id.* at 880).

125 *See, e.g.*, Oldaker v. Giles, 727 F. Supp. 3d 1330, 1348, 1357, 1360 (M.D. Ga. 2024) (permitting habeas class action allegations about conditions of immigration confinement).

126 *See, e.g.*, Da Graca v. Souza, 991 F.3d 60, 62 (1st Cir. 2021) (using class action mechanism in COVID-19 case); Gomes v. Acting Sec'y, DHS, 561 F. Supp. 3d 93, 97 (D.N.H. 2021) (same); Busby v. Bonner, 466 F. Supp. 3d 821, 833 (W.D. Tenn. 2020) (same); Yanes v. Martin, 464 F. Supp. 3d 467, 468–69 (D.R.I. 2020) (same); Cameron v. Bouchard, 462 F. Supp. 3d 746, 773–74 (E.D. Mich. 2020) (same); Wilson v. Williams, 455 F. Supp. 3d 467, 478 (N.D. Ohio 2020) (same); Savino v. Souza, 453 F. Supp. 3d 441, 453 (D. Mass. 2020) (same); Jane v. Rodriguez, No. 20-5922, 2020 WL 6867169, at *12 (D.N.J. Nov. 23, 2020) (same); Coreas v. Bounds, Nos. 20-780 & 20-1304, 2020 WL 5593338, at *15 (D. Md. Sep. 18, 2020) (same).

results from de facto jurisdictions, we found only three district court orders that even entertained the unavailability of habeas class treatment — all very recent, and all citing the footnote in Justice Thomas's 2018 *Jennings* concurrence.[127]

The Supreme Court has recently foreclosed class treatment for one set of habeas claims that lower courts had previously certified, but that decision was rooted in the incompatibility between a specific immigration provision and class treatment. Section 1252(f)(1) of Title 8 provides that:

> No court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.[128]

In *Garland v. Aleman Gonzalez*,[129] the Court held that § 1252(f)(1) generally bars class actions to enforce certain immigration rules spelled out in 8 U.S.C. §§ 1221–1232.[130] *Aleman Gonzalez*, then, was firmly rooted in the text of § 1252(f)(1) and expressed no broader principles about the appropriateness of habeas class actions. The restrictions do not implicate, for example, challenges to AEA removal.

One area where we did not observe much class action activity is in the detention context most associated with modern habeas corpus: post-conviction review. The class action inactivity is largely due to the

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[127] *See* Lynn v. Davis, No. M-18-CV-162, 2019 WL 570770, at *1 (S.D. Tex. Jan. 28, 2019) ("It is unclear whether Petitioner's habeas claim could ever proceed as a class action. . . . [I]t is unnecessary to address that issue since Petitioner has clearly failed to meet the requirements for class certification.") (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring in Part I and Parts III–VI and concurring in the judgment)), *report and recommendation adopted*, No. M-18-CV-162, 2019 WL 937058 (S.D. Tex. Feb. 26, 2019); Bomer v. Garrido, No. 20cv199, 2020 WL 10459750, at *2 n.1 (E.D. Tex. May 18, 2020) ("It is unclear whether habeas claims can proceed as a class action." (citing *Jennings*, 138 S. Ct. at 858 n.7 (Thomas, J., concurring in Part I and Parts III-VI and concurring in the judgment))), *report and recommendation adopted*, No. 20cv199, 2021 WL 3032708 (E.D. Tex. July 19, 2021); W.M.M. v. Trump, 782 F. Supp. 3d 370, 392 (N.D. Tex.) ("[R]ecent writings have shed doubt on [the] proposition [that habeas claims can proceed as class actions]. . . . The Court need not decide this broad issue because it can resolve the pending motion on much narrower grounds.") (quoting *Jennings*, 138 S. Ct. 830, 858 n.7 (Thomas, J., concurring in Part I and Parts III–VI and concurring in the judgment)), *vacated sub nom.*, A.A.R.P. v. Trump, 145 S. Ct. 1364 (2025) (per curiam). There is another passing district court reference to the inconsistency between habeas and class treatment, but it is contemplating only habeas review of state criminal convictions. *See* Williams v. Jackson, No. 15-cv-113, 2015 WL 1541642, at *2 (S.D. Ohio Apr. 7, 2015) ("[C]lass action status is completely inconsistent with habeas corpus jurisprudence. A habeas corpus case involves an intensive examination of a particular state court criminal judgment to determine whether it complies with the United States Constitution.").

[128] 8 U.S.C. § 1252(f)(1).

[129] 142 S. Ct. 2057 (2022).

[130] *See id.* at 2062–63.

Antiterrorism and Effective Death Penalty Act of 1996[131] (AEDPA), under which courts may not reach the merits of constitutional claims unless petitioners first clear myriad procedural hurdles[132] — requiring analyses that are highly differentiated by reference to litigation history. Newly salient procedural variation in postconviction cases undercuts the commonality usually required for class certification.[133] Class actions still suited habeas adjudication involving other types of detention, however. They were still widely used, for example, to present common questions growing out of pretrial or immigration custody.[134]

What the caselaw discloses, to a degree that surprised us, is that habeas class treatment has been long running and uncontroversial. Six geographic circuits have formally approved of habeas class actions in published precedential opinions, and the six others still rely extensively on the device in practice. From the de facto jurisdictions, the only three cases (out of about two thousand) suggesting some serious controversy cited the footnote in Justice Thomas's *Jennings* concurrence, which identified the issue as unsettled.[135] Despite Justice Alito's recent attack on habeas class actions in the AEA litigation, there was simply no meaningful "controversy" over the practice in the lower federal courts.

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The robust history of habeas class action practice is of surpassing interpretive significance. As Part II explains, Rule 81 sets up a two-track system under which historically "conforming" habeas procedure is mandatory, and nonconforming-but-efficacious procedure is permitted. In other words, historical nonconformity doesn't preclude a particular procedural practice; it just triggers a downstream analysis of subsequent usage and efficacy. As far as Rules 23 and 81 are concerned, the lower court history of class action practice both (1) bolsters the argument for historical conformity and (2) represents evidence that the historically nonconforming practice is nonetheless permitted. Furthermore, legislative inaction in the face of such longstanding practice is difficult to

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[131] Pub L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[132] *Id.* §§ 104, 106, 110 Stat. at 1218–21; *see also, e.g.*, Calderon v. Ashmus, 523 U.S. 740, 747–48 (1998) (explaining the individualizing effect that the exhaustion rule has on postconviction litigation).

[133] *See* Garrett, *supra* note 23, at 408–09.

[134] *See supra* notes 100–127 and accompanying text.

[135] Even though it conceded that Ninth Circuit precedent foreclosed the question, a district court there recently described the proposition that "class proceedings are unavailable in the habeas context" as having "significant support." Arevalo v. Trump, 785 F. Supp. 3d 644, 668 (C.D. Cal. 2025). For that proposition, however, *Arevalo* cites only Justice Alito's *A.A.R.P.* dissent and a 2024 dissent from a Ninth Circuit opinion. *See id.* (citing and quoting A.A.R.P. v. Trump, 145 S. Ct. 1364, 1375 (2025) (Alito, J., dissenting); Betschart v. Oregon, 103 F.4th 607, 635 (9th Cir. 2024) (Bumatay, J., dissenting)).

interpret as something other than legislative acquiescence,[136] especially since Congress has left the practice intact while it has continued to tinker with Rules 23 and 81.[137]

II. SELECTING HABEAS CLASS ACTION PROCEDURE

Power to adjudicate class claims in habeas cases is better described as *powers*, as there are several potential sources of authority to hear representative habeas litigation. Rule 23 might apply of its own force, which would mean that federal courts *must* certify habeas classes the same way they do in any other civil litigation. But even if Rule 23 does not apply of its own force, it still captures principles of representative litigation that *may* apply by force of two other provisions: 28 U.S.C. § 1651(a) (the AWA) and 28 U.S.C. § 2243. The habeas statute itself condones representative litigation, expressly providing that attacks on a prisoner's custody can be maintained "by someone acting *in his behalf*."[138]

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[136] *See generally* 2B NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49:9 (7th ed. 2012), Westlaw (database updated Nov. 2025) (discussing rules for using legislative inaction as index of meaning); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 432–38 (2012) (discussing general features of acquiescence theories). The operation of Rules 23 and 81 are no different from a statute, and courts must honor and analyze its meaning accordingly. *Cf.* Bank of N.S. v. United States, 487 U.S. 250, 255 (1988) (holding that Federal Rule of Criminal Procedure 52 is "as binding as any statute duly enacted by Congress"); Saxbe v. Bustos, 419 U.S. 65, 74 (1974) (applying principles of "acquiescence" and "gloss" to "longstanding administrative construction" of text). *But see* David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 928 (discussing the difficulty of such a hyper-textualist approach). And for procedural practices in the federal courts, the Supreme Court does not "'lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)); *id.* at 48–51 (applying the principle to recognize permissive operation of procedure under the FRCP). The Supreme Court, moreover, has used a history of practice to infer the survival of discretionary powers exercised under the AWA. *See* Nken v. Holder, 556 U.S. 418, 426 (2009).

[137] Since habeas class actions achieved widespread use, the pertinent rules have been amended eight times: March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; April 23, 2001, effective December 1, 2001; April 29, 2002, effective December 1, 2002; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; and April 26, 2018, effective December 1, 2018. *See* FED. R. CIV. P. 23, 81.

[138] 28 U.S.C. § 2242 (emphasis added). Representative litigation has been a routine feature of habeas litigation. In English practice, for example, the only way prisoners locked in the Tower of London could bring their plight to the attention of the King's Bench was through a petition presented by a representative. *See, e.g.*, Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 1 (Eng.) (enacting statutory habeas relief for detention without trial). Section 2242 carries forward that tradition. Class action mechanisms that enforce fiduciary obligations enhance § 2242's purpose: to ensure that the habeas writ could not be "availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends," and that the representative be more than someone "asserting only a generalized interest in constitutional governance." Whitmore v. Arkansas, 495 U.S. 149, 164 (1990)

A. Rule 81's Conflict-of-Laws Analysis

The very first sentence of Rule 1 provides that the FRCP "govern the procedure in all civil actions and proceedings in the United States district courts, *except as stated in Rule 81*."[139] Rule 81, in turn, describes how and to what extent the FRCP apply to particular proceedings that are not run-of-the-mill civil actions.[140] Rule 81(a)(4), addressing habeas corpus cases, reads:

> (4) . . . [The FRCP] apply to proceedings for habeas corpus . . . to the extent that the practice in those proceedings: (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and (B) has previously conformed to the practice in civil actions.[141]

Generally speaking, then, the Rule requires a conflict-of-laws approach that reconciles the FRCP with practice in habeas corpus cases.

A brief detour into the basics of habeas practice will help in understanding Rule 81(a)(4). The fundamental power to issue habeas writs is codified at 28 U.S.C. § 2241.[142] Congress has also enacted more specific statutes governing postconviction review: Claims by prisoners challenging state sentences are brought under 28 U.S.C. § 2254 and those challenging federal sentences under § 2255.[143] All other habeas claims proceed under § 2241. (The AEA litigation, for example, takes place under that provision.) The procedures in postconviction challenges are also governed by two sets of bespoke postconviction rules (discussed in more detail below): the Rules Governing Section 2254 Cases (for state prisoners) and the Rules Governing Section 2255 Cases (for federal

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(quoting United States *ex rel.* Bryant v. Houston, 273 F. 915, 916 (2d Cir. 1921)); *see also* United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1126 (2d Cir. 1974) (observing that class treatment is consistent with provision); Ali v. Ashcroft, 213 F.R.D. 390, 406 (W.D. Wash.) (same), *aff'd*, 346 F.3d 873 (9th Cir. 2003), *opinion withdrawn on denial of reh'g sub nom.*, Ali v. Gonzales, 421 F.3d 795 (9th Cir. 2005), *as amended on reh'g* (Oct. 20, 2005). The tests that courts use to screen out "intruders and meddlers" generally require a representative to show a sufficiently aligned relationship to the filer, a reason for recourse to representative litigation, and that they are not using the device to engage in the unauthorized practice of law. *See, e.g.*, Weber v. Garza, 570 F.2d 511, 513–14 (5th Cir. 1978) (applying provision in next-friend context).

139 FED. R. CIV. P. 1 (emphasis added).

140 FED. R. CIV. P. 81(a).

141 FED. R. CIV. P. 81(a)(4). Rule 81 was amended in 2002 to add the references to the Rules Governing Section 2254 and 2255 Cases. FED. R. CIV. P. 81 advisory committee's note to 2002 amendment.

142 *See* 28 U.S.C. § 2241.

143 Section 2254 cases are habeas cases; technically, § 2255 cases are not, even though the rules largely mirror those under § 2254. *See* United States v. Hayman, 342 U.S. 205, 217 (1952). The primary difference between § 2255 cases attacking federal sentences and § 2254 cases attacking state sentences is that § 2255 cases take place in the sentencing court, whereas § 2254 cases take place in the district of confinement. *See id.* at 215.

prisoners).[144] Section 2241 cases, however, are not subject to bespoke procedural rules.

Rule 81(a)(4) means that, in habeas cases, FRCP content can be barred, made mandatory (to apply of its own force), or permitted. Courts are (1) *barred* from applying FRCP content that conflicts with the habeas statute or, in postconviction cases, with the bespoke rules.[145] Courts are (2) *required* to apply portions of the FRCP that "previously conformed" to habeas practice and are not barred.[146] And courts are (3) *permitted* to apply content from the FRCP that is nonconforming but not barred.[147] The Supreme Court interpreted Rule 81 to require this framework, and lawmakers fully adopted it thereafter.

Specifically, the Supreme Court laid out this conflict-of-laws approach to Rule 81(a)(4) in *Harris v. Nelson*, where it endorsed the principle that federal courts adjudicating habeas cases can borrow FRCP content "by analogy" when it doesn't apply of its own force.[148] Since *Harris* was decided in 1969, the Rules Committee and Congress have fully embraced it,[149] the Supreme Court has reiterated its framework,[150] and multiple rules and amendments reflecting its principle have become law under the Rules Enabling Act.[151]

1. Harris v. Nelson. — *Harris* was the formative decisional moment in the modern conflict-of-laws approach to which rules apply in habeas cases. In *Harris*, the habeas claimant wanted to send interrogatories to his jailer under Rule 33.[152] *Harris* considered two questions under Rule 81: (1) whether Rule 33 applied of its own force,[153] and (2) if Rule 33 did not apply of its own force, whether the claimant might be authorized to send interrogatories under some other statute.[154]

As to whether Rule 33 applied of its own force, *Harris* said no.[155] Rule 81 was intended, *Harris* said, "to provide for the continuing

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144 *See generally Habeas Corpus: Hearing on H.R. 15319 Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 94th Cong. 2 (1976) [hereinafter *1976 Congressional Report*] (statement of Sen. William L. Hungate, Chairman, Subcomm. on Crim. Just. of the H. Comm. on the Judiciary) (detailing various features of new rules for § 2254 and § 2255 cases).

145 *See* FED. R. CIV. P. 81(a)(4).

146 FED. R. CIV. P. 81(a)(4)(B).

147 *See infra* section II.A.2, pp. 1523–25.

148 394 U.S. 286, 294 (1969). There is also important circuit precedent. *See, e.g.*, *In re* Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985) (holding that Rule 65 did not "limit . . . the court's authority provided by the All-Writs Act" to issue preliminary injunctions); Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126, 127 (1st Cir. 1941) (per curiam) (invoking the AWA to apply Rules 26 and 45 "by analogy").

149 *See infra* notes 184–191 and accompanying text.

150 *See* Bracy v. Gramley, 520 U.S. 899, 904 (1997).

151 Rules Enabling Act of 1934, Pub. L. No. 415, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2071–77); *see infra* notes 184–191 and accompanying text.

152 *See Harris*, 394 U.S. at 289.

153 *See id.* at 292–98.

154 *See id.* at 298–301.

155 *See id.* at 293.

applicability of the 'civil' rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the 'specified' proceedings had theretofore utilized the modes of civil practice."[156] The Court noted "a general and nonspecific understanding" on the part of the rulemakers that the FRCP "would have very limited application to habeas corpus proceedings" of their own force.[157] *Harris* explained that Rule 33 could apply only if, "on conventional principles of statutory construction, . . . the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding."[158]

There was no "general discovery practice in habeas corpus proceedings prior to" the 1938 promulgation of Rule 33,[159] and *Harris* found the application of Rule 33 inconsistent with existing habeas practice between 1938 (when the FRCP went into effect) and 1969 (when *Harris* was decided).[160] For instance, 28 U.S.C. § 2246 contained a narrower interrogatory provision applicable in habeas cases, which would be superfluous were Rule 33 to be globally applied.[161] Moreover, the scope and recipients of Rule 33 interrogatories were inconsistent with the norms of habeas litigation, such "that the literal application of Rule 33 to habeas corpus proceedings *would do violence to the efficient and effective administration of the Great Writ*."[162] For these reasons, *Harris* expressly left open the possibility that some other FRCP might apply of its own force even if it described procedure that developed after 1938.[163] Rule 33, however, did not apply.

On the second question identified above — whether a FRCP inapplicable of its own force might apply analogically — *Harris* offered a full-throated affirmation. Any determination that a FRCP didn't apply on its own, the Court said, was "without prejudice, *of course*, to the use of particular rules by analogy or otherwise, where appropriate."[164] Later in the opinion, *Harris* again emphasized that, "[*c*]*learly*, . . . the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage."[165] And *Harris* closes with a final reminder: "We repeat that it does not follow from

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156 *Id.* at 294.
157 *Id.* at 295.
158 *Id.* at 298.
159 *See id.* at 295.
160 *See id.* at 295–98.
161 *See id.* at 296.
162 *Id.* at 297 (emphasis added).
163 *See id.* at 293 ("We need not consider this contention that the Court of Appeals took an unnecessarily restricted view of the thrust of the 'conformity' requirement . . . .").
164 *Id.* at 294 (emphasis added).
165 *Id.* at 299 (emphasis added).

this that district judges are without power to enter necessary orders in the absence of rules."[166]

Harris flagged two sources of authority for analogues. First, in habeas corpus proceedings, the All Writs Act, 28 U.S.C. § 1651(a), "suppl[ies] the courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution, provided only that such instruments are 'agreeable' to the usages and principles of law."[167] Second, *Harris* twice mentions 28 U.S.C. § 2243, which empowers courts to "dispose of the [habeas] matter as law and justice require."[168] As set forth below, both § 1651(a) and § 2243 figure prominently in analysis of whether habeas class actions can be maintained.

The order and auxiliary opinions in *Harris* emphasize how deliberate the Court had been in its embrace of expansive analogical power. *Harris* remanded the case to the lower courts, which had not decided whether interrogatories might be authorized under § 1651(a) or § 2243.[169] Four Justices dissented across three opinions,[170] and *all* of them focused on the second question recited above: the circumstances under which a federal court might authorize Rule 33–like discovery pursuant to some other authority.[171] The Court specifically rejected Justice Harlan's argument that the power to use non-FRCP authority was "narrow," and that it could be exercised only "when essential to render a habeas corpus proceeding effective."[172] Even in dissent, Justice Stewart agreed that, "in carrying out their duty to dispose of habeas corpus applications 'as law and justice require,'"[173] judges "should not be inhibited by inflexibly formalized procedural rules"[174] and "should be given wide leeway for 'discretion to exercise their common sense.'"[175]

In sum, the *Harris* opinions capture disagreement about when the FRCP apply of their own force in habeas cases. On that issue, the Court's inquiry was a mélange of textualism, original intent, original understanding, and pragmatism.[176] When deciding own-force application, *Harris* withheld guidance beyond the inapplicability of Rule 33.[177]

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166 *Id.* at 301 n.7; *cf.* Boumediene v. Bush, 553 U.S. 723, 783 (2008) (holding that in cases of executive detention, the Constitution requires that the writ be "effective," meaning that "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain").

167 *Harris*, 394 U.S. at 300.

168 *Id.* at 290, 299 (quoting 28 U.S.C. § 2243).

169 *See id.* at 300–01.

170 *See id.* at 301–03 (Black, J., dissenting); *id.* at 303–07 (Harlan, J., dissenting, joined by White, J.); *id.* at 307–08 (Stewart, J., dissenting).

171 *See id.* at 301–02 (Black, J., dissenting); *id.* at 303 (Harlan, J., dissenting); *id.* at 307–08 (Stewart, J., dissenting).

172 *Id.* at 303 (Harlan, J., dissenting); *id.* at 300 n.7 (majority opinion).

173 *Id.* at 307 (Stewart, J., dissenting) (quoting 28 U.S.C. § 2243).

174 *Id.*

175 *Id.* at 308 (quoting Machibroda v. United States, 368 U.S. 487, 495 (1962)).

176 *See supra* notes 156–163 and accompanying text.

177 *See Harris*, 394 U.S. at 293.

Coming out of *Harris*, however, courts could unquestionably incorporate FRCP *content* analogically, by force of the All Writs Act and § 2243.[178]

*2. Post-*Harris *Conflict Rules*. — *Harris* urged lawmakers to develop special rules in § 2254 and § 2255 cases,[179] so that courts need not rely excessively on Rule 81 to resolve all conflict-of-laws questions. With the help of an advisory committee, the Supreme Court eventually promulgated the bespoke rules for postconviction litigation, which took effect in 1977.[180] In the process of doing so, the rulemakers fully endorsed *Harris*'s conflict-of-laws approach, including its direction to look to the FRCP for guidance when filling procedural gaps.[181]

The bespoke postconviction rules for both § 2254 and § 2255 cases include language specifically recognizing courts' authority to fill procedural gaps with content from the FRCP. Each set of bespoke rules contains a conflict-of-laws provision — Rule 12 — providing that the FRCP "may" apply in postconviction habeas proceedings "to the extent that they are not inconsistent with any statutory provisions or these rules."[182] The Rules 12 thereby give courts discretion to apply FRCP content analogically in postconviction cases, as long as the analogues do not conflict with more specific provisions of the bespoke rules or with some other statute.[183]

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178 *See id.* at 299. The Supreme Court reaffirmed this understanding in *Bracy v. Gramley*, 520 U.S. 899 (1997). *See id.* at 904.

179 *See Harris*, 394 U.S. at 301 n.7.

180 *See* Act of Sep. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334.

181 *See 1976 Congressional Report*, *supra* note 144, at 95 (joint statement of William H. Webster, J., U.S. Ct. of Appeals for the Eighth Cir., Frank J. Remington, Member, Standing Comm. on Rules of Prac. & Proc., and Wayne R. LaFave, Rep., Advisory Comm. on Crim. Rules) ("Work upon these particular rules was commenced as a result of the declaration . . . [in] *Harris v. Nelson* that the rulemaking machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and 2255 proceedings."); *id.* at 103 (testimony of Prof. Wayne R. LaFave, Univ. of Ill. Coll. of L.) (detailing the legislative history of the promulgation of the § 2254 and § 2255 Rules following the Supreme Court's decision in *Harris*).

182 *See* R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS 12 [hereinafter § 2254 RULES 12]; R. GOVERNING § 2255 PROCEEDINGS FOR THE U.S. DIST. CTS 12 [hereinafter § 2255 RULES 12]. Rule 12 of the § 2255 Rules also permits the application of the Federal Rules of Criminal Procedure, where appropriate. *See* § 2255 RULES 12. What is now Rule 12 in the § 2254 Rules used to be Rule 11, and some of the authority herein refers to it as Rule 11. *See* § 2254 RULES 12 advisory committee's note to 2009 amendment. Herein, we primarily refer to the advisory committee's note to Rule 12 of § 2254; however, that note applies to both Rules 12. *See* § 2255 RULES 12 advisory committee's note (incorporating discussion in § 2254 RULES 12 advisory committee's note).

183 § 2254 RULES 12; § 2255 RULES 12; *see also* FED. R. CIV. P. 81(a)(4) (barring application of FRCP when in conflict with bespoke postconviction rules or statute); United States v. Frady, 456 U.S. 152, 167–68 n.15 (1982) (explaining that conflict-of-laws provisions in bespoke postconviction rules direct federal courts to use discretion in applying FRCP).

The postconviction rules thus reinforce *Harris*'s approach to Rule 81.[184] As the Advisory Committee itself explained, Rule 81 "dovetails with the provisions" in Rules 12 of the § 2254 and § 2255 Rules.[185] The postconviction Rules 12 — and, by extension, FRCP Rule 81 — are "intended to conform with the Supreme Court's approach in the *Harris* case."[186] The Advisory Committee for the postconviction rules cited the pieces of *Harris* that it was endorsing, including the idea that it "is the inescapable obligation of the courts"[187] to "fashion appropriate modes of procedure[] by analogy to existing rules or otherwise in conformity with judicial usage."[188]

The Advisory Committee for the postconviction rules also identified familiar authority for federal courts to apply FRCP content analogically: § 1651(a) and § 2243.[189] The Advisory Committee made clear that the bespoke rules encode *Harris*. For example, it stated that, in postconviction cases, a federal court may "use any of the rules of civil procedure (unless inconsistent with the[] rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case."[190] Advisory Committee Reporters Judge William H. Webster, Professor Frank Remington, and Professor Wayne LaFave jointly stated that the conflicts rules were "consistent with the approach" in *Harris*, in that they "recognize[] and affirm[] the discretionary power of courts to use their judgment in promoting the ends of justice."[191]

Those who crafted the bespoke postconviction rules did not make the express choice to *permit* FRCP content in postconviction litigation only to *bar* it in other habeas cases. Postconviction cases are, after all, the cases *least* suited to typical civil adjudication because they are most constrained by other expressly enacted procedure.[192] Instead, the rule promulgators simply recognized that Rule 81 did what courts had

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184 *See 1976 Congressional Report*, *supra* note 144, at 47 (statement of Daniel J. Kremer, Assistant Att'y Gen., State of Cal.) ("Th[is] rule is evidently intended to conform with the Supreme Court's approach in *Harris* . . . .").

185 FED. R. CIV. P. 81 advisory committee's note to 2002 amendment. Rule 81 was amended again in 2007 to deal with a specific issue that arose because Rule 81 predated the bespoke rules for Section 2254 and 2255 cases. Pre-amendment, Rule 81 hadn't referenced the § 2254 or § 2255 Rules, leaving uncertainty about what to do when the FRCP and the postconviction rules conflicted. The 2007 Amendment clarified that, when applicable, the bespoke postconviction rules dominated the FRCP. The 2007 "changes are intended to be stylistic only" — meaning that they restated the conflict-of-laws analysis that preexisted them. FED. R. CIV. P. 81 advisory committee's note to 2007 amendment.

186 *See* § 2254 RULES 12 advisory committee's note.

187 *Id.*

188 *Id.* (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)).

189 *See id.* (citing *Harris*, 394 U.S. at 290, 294, 299).

190 *Id.*

191 *1976 Congressional Report*, *supra* note 144, at 102 (joint statement of William H. Webster, J., U.S. Ct. of Appeals for the Eighth Cir., Frank J. Remington, Member, Standing Comm. on Rules of Prac. & Proc., and Wayne R. LaFave, Rep., Advisory Comm. on Crim. Rules).

192 *See* AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996); § 2254 RULES 12; § 2255 RULES 12.

always believed it to do: direct courts to incorporate appropriate FRCP content. That's why they said that postconviction Rules 12 and FRCP Rule 81 did the same thing.[193]

Summarizing to this point, the modern conflict-of-laws analysis for habeas cases proceeds as follows: (1) Under FRCP Rule 81, a statute (or, in postconviction cases, a bespoke rule) can bar the application of some portion of the FRCP.[194] (2) In the absence of an inconsistent statute (or bespoke postconviction rule), a FRCP applies of its own force if there is historically "conform[ing]"[195] habeas practice.[196] (3) If there is no historically conforming practice, then courts can still apply appropriate FRCP content analogically, by force of some other statute like § 1651(a) or § 2243, or even postconviction Rules 12.[197]

B. Applicability of the Class Action Rule in Habeas Cases

As to the question of habeas class actions, then, the conflict-of-laws question is whether Rule 23(b)(2) is barred by statute or the postconviction rules, applies of its own force, or applies analogically by force of the All Writs Act or § 2243. There is no federal statute barring class actions in habeas cases. The bespoke postconviction rules are silent on class actions, and, in any event, most habeas class actions (such as challenges to immigration removal) will proceed under § 2241 — where the postconviction rules do not apply.

1. Of Its Own Force. — Before we explore the analogic arguments in detail, we offer a brief word on the argument that Rule 23 applies *of its own force*. *Middendorf* reserved that specific question in 1976,[198] following a more general reservation in *Harris*.[199] The of-its-own-force analysis turns on what it means for FRCP-specified procedure to have

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193 *See* § 2254 RULES 12 advisory committee's note.

194 *See* FED. R. CIV. P. 81(a)(4)(A).

195 FED. R. CIV. P. 81(a)(4)(B).

196 *See id.* Both the Supreme Court and lower courts have applied a number of FRCP in habeas cases. *See, e.g.*, Banister v. Davis, 140 S. Ct. 1698, 1706 (2020) (FRCP 59(e)); Dye v. Hofbauer, 546 U.S. 1, 4 (2005) (per curiam) (FRCP 10(c)); Mayle v. Felix, 545 U.S. 644, 654–55 (2005) (FRCP 15(c)(2)); Gonzalez v. Crosby, 545 U.S. 524, 533 (2005) (FRCP 60(b) to the extent that it does not assert a new claim or dispute the substantive resolution of an old claim); Woodford v. Garceau, 538 U.S. 202, 208 (2003) (FRCP 3); Browder v. Dir., Dep't of Corr., 434 U.S. 257, 270–72 (1978) (FRCP 52(b) & 59); Green v. Sec'y, Dep't of Corr., 28 F.4th 1089, 1158 n.140 (11th Cir. 2022) (FRCP 12(e)); Ross v. Williams, 950 F.3d 1160, 1166 (9th Cir. 2020) (FRCP 10(c) & 15(c)(1)(B)); United States v. Johnson, 254 F.3d 279, 283–84 (D.C. Cir. 2001) (FRCP 58); Clark v. Johnson, 202 F.3d 760, 764 (5th Cir. 2000) (FRCP 56); Barrett v. United States, 965 F.2d 1184, 1187 & n.4 (1st Cir. 1992) (FRCP 7(b)(3) & 11); Blake v. Zant, 737 F.2d 925, 927–28 (11th Cir. 1984) (FRCP 54(b)); United States *ex rel.* Moore v. Fike, 538 F.2d 1301, 1302 (7th Cir. 1976) (FRCP 52(a)); United States *ex rel.* Bibbs v. Twomey, 538 F.2d 151, 154 (7th Cir. 1976) (FRCP 78); United States v. Scarlata, 214 F.2d 807, 808 n.1 (3d Cir. 1954) (FRCP 73(a)).

197 *See supra* notes 164–175, 179–191 and accompanying text.

198 *See* Middendorf v. Henry, 425 U.S. 25, 30 (1976).

199 *See* Harris v. Nelson, 394 U.S. 286, 295 n.5 (1969).

"previously conformed to" habeas practice.[200] One straightforward way to approach that question would be to take September 16, 1938, when the FRCP went into force, as the benchmark.[201] That would require courts to ask whether the procedure in question "was actually being used in habeas proceedings" before that date.[202] That was the lower court's approach in *Harris*;[203] if it is the correct one, then Rule 23 is unlikely to apply of its own force, given the lack of documented class action practice in habeas cases before then.[204] But *Harris* expressly declined to adopt the lower court's 1938 benchmark, and the Supreme Court has repeatedly reserved the question since.[205]

Alternatively, the question of conformity might be governed by a more holistic, textured analysis along the lines of the *Harris* majority — taking into account practice before and after the FRCP's adoption, the applicability of overlapping habeas-specific rules, and the general fit between the rule at issue and "the special problems and character of [habeas] proceedings."[206] If that is the correct approach, then there is a reasonable case for sufficient conformance.

Whatever the approach, it is simply not accurate to say that habeas practice necessarily involves retail, prisoner-by-prisoner litigation. Even during the 1800s, courts collectivized habeas litigation when the individual prisoners challenged a common basis for detention. One notable example is from May of 1890, in San Francisco.[207] Local lawmakers enacted the so-called "Bingham Ordinance," a racist law requiring Chinese people to live within prescribed municipal boundaries or to leave the city entirely.[208] The Chinese community, supported by Chinese diplomatic representatives, mounted a legal challenge to the Ordinance.[209] A free man filed a next-friend petition on behalf of twenty Chinese prisoners who had been arrested for refusing to leave.[210] The

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200 FED. R. CIV. P. 81(a)(4)(B).

201 *See* FED. R. CIV. P. historical note.

202 *Harris*, 394 U.S. at 293 (quoting Wilson v. Harris, 378 F.2d 141, 144 (9th Cir. 1967)).

203 *See Wilson*, 378 F.2d at 144, *rev'd sub nom.*, *Harris*, 394 U.S. 286.

204 Although we located no pre-1938 cases that we would call *class actions*, there was a generally accepted practice of representative litigation wherein one party acted on another's behalf. *See* Collins v. Traeger, 27 F.2d 842, 843 (9th Cir. 1928) (collecting cases and referring to practice as backed by "weight of authority").

205 *See Harris,* 394 U.S. at 293 ("We need not consider this contention . . . ."); *see also, e.g.*, Schall v. Martin, 467 U.S. 253, 261 n.10 (1984) (reserving general question); Middendorf v. Henry, 425 U.S. 25, 30 (1976) (reserving of-its-own-force question). Given that the modern Rule 23 arrived in 1966 and that there is no documented class action practice in habeas cases before then, the repeated reservation of the question since then implies that 1966 is not the benchmark date either. *Cf. Schall*, 467 U.S. at 261 n.10 (reserving question nonetheless).

206 *Harris*, 394 U.S. at 296; *see id.* at 295–98.

207 *See generally* Charles J. McClain, In Re Lee Sing*: The First Residential-Segregation Case*, 3 W. LEGAL HIST. 179 (1990) (describing collectivized habeas litigation).

208 *See id.* at 186, 188.

209 *See id.* at 188–91.

210 *See id.* at 191 (discussing *In re* Lee Sing, 43 F. 359 (C.C.N.D. Cal. 1890)).

federal judge thereafter consolidated those cases with another that was already on the docket, adjudicating the challenges collectively and ordering full discharge from custody for all prisoners.[211]

As the Bingham Ordinance example shows, courts have entertained multiparty habeas petitions since long before the FRCP were adopted. And the history of class action activity documented in this section demonstrates that, over the past sixty years, courts have applied the class action rules to habeas cases without "do[ing] violence to the efficient and effective administration of the Great Writ."[212]

Still, we have been unable to obtain non-decisional evidence about the meaning intended by the Rule 81 promulgators.[213] And neither *Harris* nor the Court's repeated reservation of the question since *Harris* give us the answer. We will say, only provisionally, that it would have been odd for the Rules Committee to prospectively rule out mandatory application of all new FRCP in habeas cases — the result that would obtain if Rule 81 adopted a bright-line 1938 benchmark for measuring conformance. For our purposes, however, the stakes of resolving the benchmark question are low because courts' authority to apply Rule 23 content analogically, under the All Writs Act and § 2243, is so clear. The next two sections take those provisions in turn.

2. The All Writs Act. — The All Writs Act, now 28 U.S.C. § 1651(a), has been in effect since 1789.[214] It provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[215] Section 1651(a) is a residual source of power for orders not specifically authorized by other statutes, as long as those orders effectuate jurisdiction.[216] It "empowers federal courts to fashion extraordinary remedies,"[217] and it "fill[s] the interstices of federal judicial power when those gaps threaten[] to thwart the otherwise proper exercise of federal courts' jurisdiction."[218] Recall that, per *Harris*, it is the federal courts' "inescapable obligation" to use § 1651(a) to "fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage."[219]

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[211] *See Lee Sing*, 43 F. at 362; McClain, *supra* note 207, at 191–92, 194.

[212] Harris v. Nelson, 394 U.S. 286, 297 (1969); *see infra* section III.B pp. 1542–52.

[213] *Cf. Harris*, 394 U.S. at 294 ("[T]here is little direct evidence, relevant to the present problem, of the purpose of the 'conformity' provision of Rule 81(a)(2)[] . . . .").

[214] *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

[215] 28 U.S.C. § 1651(a).

[216] *See infra* notes 217–28 and accompanying text.

[217] Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985).

[218] *Id.* at 41.

[219] Harris v. Nelson, 394 U.S. 286, 299 (1969); *see also infra* notes 231–235 (collecting other authority regarding supplementary use of All Writs Act).

The All Writs Act is defined by its flexibility.[220] It grants to federal courts the power not only to protect extant jurisdiction,[221] but also to protect jurisdiction yet to be formally acquired.[222] That power is best illustrated when a court acts to preserve unperfected appellate jurisdiction. As the Supreme Court put it in *FTC v. Dean Foods Co.*,[223] the leading case on protective § 1651(a) orders: "The exercise of this power . . . extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected."[224] In *Dean Foods*, the Court further interpreted § 1651(a) to empower judges to enjoin conduct pending administrative action that is subject to subsequent judicial review.[225] Speaking more abstractly, *Dean Foods* held that there is "ample precedent to support" judicial power to issue preliminary relief necessary to protect the efficacy of a subsequent remedial order.[226]

Lower courts have long interpreted *Dean Foods* to permit § 1651(a) "orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it."[227] Courts have, for example, invoked § 1651(a) as the source of power to stay a state execution pending the prisoner's filing of a federal habeas petition — holding that "*Dean Foods* authorizes issuance of a writ under the All Writs Act if it is

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220 *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1507 (explaining that the All Writs Act could be used for both "the accomplishment of minor details" and "matters of great moment").

221 *See* 28 U.S.C. § 1651(a) (empowering courts to issue writs "in aid of their respective jurisdictions").

222 *See* 33 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 8313 (2d ed. 2025) (citing FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (holding that AWA permits appellate court to protect jurisdiction that it has not yet acquired); Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984) (applying principle to judicial review of agency inaction)).

223 384 U.S. 597 (1966).

224 *Id.* at 603.

225 *See id.* at 603–04; *see also* Sheehan v. Purolator Courier Corp., 676 F.2d 877, 884 (2d Cir. 1981) ("In general, if the court eventually will have jurisdiction of the substantive claim and an administrative tribunal has preliminary jurisdiction, the court has incidental equity jurisdiction to grant temporary relief to preserve the status quo pending the ripening of the claim for judicial action on its merits.").

226 *Dean Foods*, 384 U.S. at 605; *cf.* McFarland v. Scott, 512 U.S. 849, 855–58 (1994) (holding that, in order to "give[] meaning to the [habeas] statute as a practical matter," *id.* at 855, detained prisoners were entitled to appointed counsel and stays before formally filing habeas petitions).

227 ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978) (citing *Dean Foods*, 384 U.S. at 603–05); *see also Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 76 ("This authority extends to support an ultimate power of review, even though it is not immediately and directly involved. In other words, section 1651(a) empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction." (citation omitted)); *Sheehan*, 676 F.2d at 887 (holding that § 1651(a) provides "jurisdiction to entertain a motion for temporary injunctive relief against employer retaliation while the charge is pending before the EEOC and before the EEOC has issued a right to sue letter"); *In re* Tennant, 359 F.3d 523, 529 (D.C. Cir. 2004) (explaining that § 1651(a) authority can be used "[o]nce there has been a proceeding of *some* kind instituted before an agency or court"); Orbe v. True, 201 F. Supp. 2d 671, 676 (E.D. Va. 2002) (recognizing § 1651(a) power to order preservation-of-evidence orders before filing habeas petitions, in certain circumstances).

necessary to preserve a court's potential jurisdiction."[228] And, apart from the habeas context, the Federal Circuit recognizes the All Writs Act as the basis for class actions in the Veterans Court.[229]

Unsurprisingly, there is a particularly robust lower court history of using § 1651(a) as the source of power for habeas class treatment. The first post-*Harris* case clearly endorsing habeas class actions, *Adderly v. Wainwright*,[230] held that, "under [§ 1651(a)] alone, Rule 23 may, when appropriate, be applied by analogy to a petition for writ of habeas corpus."[231] The foundational circuit court case, *United States ex rel. Sero v. Preiser*,[232] explicitly relied on § 1651(a) to conduct "a multi-party proceeding similar to the class action authorized by [Rule 23]."[233] All of the cases that rely on *Sero* necessarily rely, by way of transitivity, on § 1651(a).[234] Section 1651(a) has been the source of power to adjudicate class challenges to practices ranging from prisoner transfers to COVID-19 policies.[235]

In the AEA cases currently percolating through federal courts, § 1651(a) has been the primary source of authority cited for class treatment.[236] In *A.A.R.P. v. Trump* — when the Supreme Court intervened and barred the removal of people who might later become members of a Rule 23(b)(2) class challenging the AEA — it cited § 1651(a) as the basis of its "power to issue injunctive relief . . . to preserve [its] jurisdiction over the matter."[237] While *A.A.R.P.* formally extended only temporary class-wide relief,[238] there is no material difference between, on the

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[228] Brown v. Vasquez, 743 F. Supp. 729, 731 (C.D. Cal. 1990), *aff'd on a different rationale*, 952 F.2d 1164 (9th Cir. 1991) (amended 1992).

[229] *See* Monk v. Shulkin, 855 F.3d 1312, 1318 (Fed. Cir. 2017); *see also* Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1428 (2022) ("[A]ppellate courts have used the All Writs Act to fashion new procedures in aid of their jurisdiction, including class action rules.").

[230] 58 F.R.D. 389 (M.D. Fla. 1972).

[231] *Id.* at 401; *see also* Adderly v. Wainwright, 46 F.R.D. 97, 99 (M.D. Fla. 1968) (original holding certifying class).

[232] 506 F.2d 1115 (2d Cir. 1974).

[233] *Id.* at 1125.

[234] *See, e.g.*, Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975) ("Nevertheless, as [*Sero*] also held, a representative procedure analogous to the class action provided for in Rule 23 may be appropriate in a habeas corpus action under some circumstances.").

[235] *See, e.g.*, Malam v. Adducci, 475 F. Supp. 3d 721, 728, 733 (E.D. Mich.) (invoking § 1651(a) as source of power to form class to challenge COVID-19 policy), *amended by* No. 20-10829, 2020 WL 4818894 (E.D. Mich. Aug. 19, 2020); Ferreyra v. Decker, 456 F. Supp. 3d 538, 542–43 (S.D.N.Y. 2020) (same); Arias v. Decker, 459 F. Supp. 3d 561, 567 (S.D.N.Y. 2020) (same); Whitted v. Easter, No. 20-cv-569, 2020 WL 4605224, at *1–2 (D. Conn. Aug. 11, 2020) (same); *see also* Solomon v. Zenk, No. 04-cv-2214, 2004 WL 2370651, at *3–5 (E.D.N.Y. Oct. 22, 2004) (quoting *Sero*, 506 F.2d at 1125) (concerning inmate transfers).

[236] *See, e.g.*, J.A.V. v. Trump, 349 F.R.D. 152, 154, 156 (S.D. Tex. 2025) (holding that § 1651(a) authorizes class treatment in AEA habeas cases); D.B.U. v. Trump, 349 F.R.D. 228, 235 (D. Colo. 2025) (same); M.A.P.S. v. Garite, 349 F.R.D. 631, 636 (W.D. Tex. 2025) (same); G.F.F. v. Trump, 348 F.R.D. 586, 588 (S.D.N.Y. 2025) (same), *amended sub nom.*, J.G.G. v. Trump, No. 25 Civ. 2886, 2025 WL 1166909 (S.D.N.Y. Apr. 11, 2025).

[237] A.A.R.P. v. Trump, 145 S. Ct. 1364, 1369 (2025).

[238] *See id.*

one hand, class treatment of detainees' notice-and-opportunity rights to present their habeas claims and, on the other, class treatment of the claims themselves.

3. 28 U.S.C. § 2243. — The other source of power to supply FRCP content by analogy is 28 U.S.C. § 2243, which specifies certain procedures in habeas actions.[239] The language in § 2243 tracks a case timeline, from filing to factfinding to remedies.[240] It fixes the appropriate respondent; the timing of show-cause orders and hearings; the contents of the return (that is, the government's response); and the processes for answering allegations, amending pleadings, and finding facts.[241] Section 2243's final sentence is a broad reservation of remedial power to make habeas authority efficacious: "The court shall summarily hear and determine the facts, *and dispose of the matter as law and justice require*."[242]

Courts' citation to § 2243 as a source of procedural power is in keeping with the provision's long statutory history. The "law and justice" language first appeared in the 1874 Revised Statutes.[243] But that language was neither intended nor understood to alter habeas practice taking place under the 1867 Habeas Corpus Act or the 1789 Judiciary Act.[244] In 1867, Congress was particularly concerned about newly freed slaves in coerced labor relationships.[245] Resistant former slaveowners were a new problem that required innovative remedies.[246] And, by 1874, federal judges exercising the habeas authority specified in the 1867 legislation had particularly expansive auxiliary power to craft procedure and remedies.[247] Later congressional action didn't alter that breadth. When Congress compiled the 1948 Judicial Code,[248] it made no

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[239] *See* 28 U.S.C. § 2243.

[240] *See id.*

[241] *See id.*

[242] *Id.* (emphasis added). Litigation over postconviction relief has recently spawned some revisionist history about § 2243. Several Justices have read the law-and-justice language in conjunction with § 2241's text providing that federal judges "may" issue habeas writs to suggest that there is some broad equitable discretion to withhold ultimate relief in habeas cases. 28 U.S.C. § 2241(a); *see, e.g.*, Brown v. Davenport, 142 S. Ct. 1510, 1520 (2022) ("That same structure lives on in contemporary statutes, which provide that federal courts 'may' grant habeas relief 'as law and justice require.'" (quoting 28 U.S.C. §§ 2241, 2243)). As one of us has explained, this argument is atextual, indifferent to broader statutory structure, and inconsistent with the legislative history of the statute. *See* Kovarsky, *supra* note 35, at 2225. Section 2241 is worded permissively because (1) there might be a better venue; and (2) there are statutory restrictions on relief that follow. *See id.* at 2242–50. And, without the § 2241 complement, there is no originalist-type argument that § 2243 is meant to deprive rather than augment judicial power. *See id.* at 2231–42.

[243] *See* Revised Statutes of 1874, 18 Stat. 1, § 761 (1873). The formal enactment publishing these statutes was the Act of June 20, 1874, ch. 333, 18 Stat. 113.

[244] *See* Kovarsky, *supra* note 35, at 2238–42.

[245] *See* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 33–38, 43–44 (1965).

[246] *See* Kovarsky, *supra* note 35, at 2239.

[247] *See id.*

[248] Act of June 25, 1948, ch. 646, 62 Stat. 869.

substantive changes to the law-and-justice provision.[249] Later statutory amendments, in 1966 and 1996, also left it untouched.[250]

Courts have historically used § 2243 as a source of considerable power to process habeas litigation. That power attaches upon "detention *simpliciter*," so it is more than just the power to protect or effectuate jurisdiction.[251] From that power springs authority to award stays pending appeal,[252] order criminal retrial or resentencing,[253] invalidate parole conditions,[254] adjudicate claims notwithstanding release during custody,[255] consolidate common issues outside of the class action context,[256] permit intervention of those with arguments in common with habeas claimants already before the court,[257] hold federal proceedings in abeyance pending collateral litigation in state court,[258] stay executions,[259] award structural injunctions,[260] and expunge convictions.[261] In accomplishing all of those things, § 2243 allows courts to set aside "comparatively cumbersome and time-consuming procedure."[262]

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[249] *See* Wingo v. Wedding, 418 U.S. 461, 468–69 (1974) ("[T]he Revisers' Notes accompanying § 2243, together with the [congressional] reports[,] . . . make abundantly clear that the word changes and omissions . . . were intended only as changes in form." *Id.* at 469 (footnotes omitted).). The 1948 Code's Chief Revisor stated that "no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed" and that "[m]ere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised." William W. Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 445–46 (1949).

[250] *See* AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996); An Act Relating to Applications for Writs of Habeas Corpus by Persons in Custody Pursuant to Judgments of State Courts, Pub. L. No. 89-711, § 1(b), 80 Stat. 1104, 1104 (1966).

[251] Fay v. Noia, 372 U.S. 391, 430 (1963), *overruled on other grounds by* Wainwright v. Sykes, 433 U.S. 72 (1977).

[252] *See, e.g.*, Hilton v. Braunskill, 481 U.S. 770, 775 (1987) (invoking § 2243 for authority to fashion order).

[253] *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 729 (1961) (affirming proposition and collecting authorities).

[254] *See, e.g.*, Peyton v. Rowe, 391 U.S. 54, 67 (1968) (characterizing Jones v. Cunningham, 371 U.S. 236 (1963)).

[255] *See, e.g.*, Carafas v. LaVallee, 391 U.S. 234, 239–40 (1968) (invoking § 2243 to permit merits determination on unlawful detention claim notwithstanding plaintiff's release prior to filing for certiorari).

[256] *See, e.g.*, Hill v. Nelson, 272 F. Supp. 790, 794–95 (N.D. Cal. 1967) (invoking § 2243 to consolidate common issues across four habeas cases).

[257] *See, e.g.*, *id.* (invoking § 2243 to permit consolidation of common claims by intervenor).

[258] *See, e.g.*, *Ex parte* Sullivan, 107 F. Supp. 514, 516 (D. Utah 1952) (invoking § 2243 to order federal proceeding held in abeyance while claimants "institute proceedings in the State Court to pursue their remedy by petition for Writ of Habeas Corpus or other corrective process").

[259] *See, e.g.*, *Ex parte* Wells, 90 F. Supp. 855, 859 (N.D. Cal. 1950) (invoking § 2243 to stay "[e]xecution of the judgment imposing the death penalty").

[260] *See, e.g.*, Watts v. Hadden, 489 F. Supp. 987, 989–90 (D. Colo. 1980) (invoking § 2243 to order U.S. Parole Commission to "take such action as shall be necessary and required to correct the foregoing failures to comply with the mandatory provisions of the Youth Corrections Act," *id.* at 990).

[261] *See, e.g.*, Mizell v. Att'y Gen., 586 F.2d 942, 948 (2d Cir. 1978) (flagging option for district court, by reference to § 2243).

[262] Holiday v. Johnston, 313 U.S. 342, 353 (1941).

Most importantly, courts have already relied on § 2243 as a source of power to certify class actions in habeas cases. *Harris* was decided in 1969.[263] As far as we can tell, the first post-*Harris* case clearly citing § 2243 as a source of authority for class treatment is *Adderly v. Wainwright*, from 1972.[264] *Adderly* certified a plaintiff class to challenge the Florida death penalty.[265] Fifty years later, the leading COVID-19 habeas class action case, *Malam v. Adducci*,[266] expressly relied on § 2243 as authority for class treatment.[267] Not only does it cite § 2243 for such authority three times,[268] but it also discusses the role that § 2243 played in *Harris*. Discussing *Harris*, *Malam* held that § 2243, together with the All Writs Act, empowers courts to "use 'appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage' in the exercise of their habeas jurisdiction."[269]

* * *

As courts contemplate class treatment in habeas cases, there are two questions. First, does Rule 23(b)(2) apply of its own force because habeas practice is sufficiently conforming? The Supreme Court expressly left this question open in *Middendorf*,[270] and we confess the correct answer is unclear to us.

Second, if Rule 23 does not apply of its own force, then may district courts nonetheless entertain class actions that follow the contours of Rule 23(b)(2), under authority granted by the All Writs Act or § 2243? As we have explained, the answer to this second question is abundantly clear: Yes, they may, and they routinely have. When Justice Alito (or a handful of district judges) express extreme uncertainty about the permissibility of analogical class treatment, they necessarily overlook *Harris*, fifty years of uniform lower court practice, and the history of the pertinent FRCP and postconviction rules.

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263 Harris v. Nelson, 394 U.S. 286, 286 (1969).

264 58 F.R.D. 389, 389 400–01 (M.D. Fla. 1972). A year earlier, the Middle District of Florida seemed to bottom its class action power on § 2243, although one might read the pertinent language as using § 2243 to justify the form of relief awarded (declaratory). *See* Cantrell v. Folsom, 332 F. Supp. 767, 768 (M.D. Fla. 1971) ("Petitioners subsequently moved to amend the petitions praying leave to proceed as a class and a declaration that the ordinance is unconstitutional; this prayer was based upon the above-mentioned allegations." (citing, inter alia, 28 U.S.C. § 2243)).

265 *See Adderly*, 58 F.R.D. at 395 n.2, 407.

266 475 F. Supp. 3d 721 (E.D. Mich.), *amended by* No. 20-10829, 2020 WL 4818894 (E.D. Mich. Aug. 19, 2020).

267 *See Malam*, 475 F. Supp. 3d at 743.

268 *See id.* at 733, 739, 743.

269 *See id.* at 733 (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)).

270 *See* Middendorf v. Henry, 425 U.S. 25, 30 (1976).

III. JUSTIFYING HABEAS CLASS ACTIONS

Part III explains that class treatment is both conceptually and doctrinally consistent with habeas adjudication. Rule 23 reflects deeper values about when and how parties ought to litigate in representative capacities. The law should leave (and has left) courts free to promote those values by way of formal authority other than Rule 23 itself. Habeas cases, like others, can involve common issues for which indivisible remedies provide class-wide relief. Habeas class treatment can end unlawful detention policies in a single stroke, allowing courts to efficiently process cases, avoid inconsistent outcomes, and protect plaintiffs who would otherwise struggle to enforce their rights in court. Whatever the formal source of authority — Rule 23, the All Writs Act, or § 2243 — courts must determine that class action treatment of habeas claims is "appropriate."[271] To do so, courts often look to Rule 23 for guidance, even in habeas cases applying Rule 23 content by analogy.[272]

When they created the modern class action in 1966, the rulemakers did not conjure the requirements of Rule 23 out of thin air. The procedures that they designed drew on earlier models of representative litigation to ensure adequate representation for absent class members.[273] For centuries, courts in equity have authorized representative suits to decide questions common to numerous interested parties.[274] Class actions in the United States trace their lineage to English bills of peace before the Revolutionary War.[275] And, before the FRCP went into effect, the

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[271] *Harris*, 394 U.S. at 290 (holding that courts "may . . . authorize the use of suitable discovery procedures" in habeas cases "in appropriate circumstances"); *see also* FED. R. CIV. P. 23(c) (requiring certification).

[272] *See, e.g.*, Napier v. Gertrude, 542 F.2d 825, 827 n.2 (10th Cir. 1976) (adopting "an analogous procedure by reference to Rule 23"); United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1126 (2d Cir. 1974) (same); Adderly v. Wainwright, 58 F.R.D. 389, 401 (M.D. Fla. 1972) (same); *Malam*, 475 F. Supp. 3d at 733 (same); United States *ex rel.* Green v. Peters, 153 F.R.D. 615, 617 n.2, 619 (N.D. Ill. 1994) (same).

[273] *See generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375–407 (1967) (documenting genesis of Rule 23).

[274] *See, e.g.*, Brown v. Vermuden (1676) 22 Eng. Rep. 802, 802; 1 Ch. Cas. 272, 272; Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302–03 (1853) ("The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." *Id.* at 302 (citing, inter alia, JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 97–99, 103, 107, 110–11, 116, 120 (Boston, Charles C. Little & James Brown 1838)).). *See generally* Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515 (1974) (describing the long history of class actions and relating that many class action statutes and rules "trace their origins . . . to the unwritten practices of English Chancery," *id.* at 517).

[275] Trump v. CASA, Inc., 145 S. Ct. 2540, 2555 (2025) ("The bill of peace lives in modern form, but not as the universal injunction. It evolved into the modern class action, which is governed in federal court by Rule 23 of the Federal Rules of Civil Procedure."); 7A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Equity Rules that the Supreme Court promulgated expressly allowed for representative suits.[276] Rule 23 therefore captures values that have roots stretching deep into historical equity practice — and that Congress, the Court, and the Rules Committee have repeatedly endorsed over time.[277]

Whether Rule 23 applies directly or by analogy, its protections are well-crafted to address deeper constitutional constraints on representative litigation.[278] As the Supreme Court has emphasized time and again, adequate representation is the key constitutional requirement.[279] Many of Rule 23's more specific requirements are designed in service of that overarching goal.[280] For its part, the Court often treats some Rule 23 requirements as at least presumptively necessary for, if not coextensive with, adequate representation.[281]

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§ 1751, at 10 (4th ed. 2025) ("It was the English bill of peace that developed into what is now known as the class action."); *see also* Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1862 (1998) ("Not all of the bill of peace cases, however, implicated the necessary parties problem. Most of these cases involved claims that could have been satisfactorily litigated without the absentees, apart from the burden of repetitive litigation.").

276 Rule 48 of the Equity Rules of 1842 read:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

EQUITY R. 48, 42 U.S. (1 How.) at xxxix, lvi (1842). In 1912, Equity Rule 38 replaced Equity Rule 48 and also provided for representative suits. It read: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." EQUITY R. 38, 226 U.S. 649, 659 (1912). Equity Rule 38 remained in effect until the original FRCP 23 superseded it in 1938.

277 From 1792 through the Rules Enabling Act of 1934, the rules for equity practice in the federal courts were promulgated directly by the Supreme Court. *Equity Rules*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/equity-rules [https://perma.cc/EA8W-UQE4].

278 *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 391–92.

279 *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008) ("In a class action, . . . a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation."); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (articulating principle that an absent party can be judgment-bound if "they are in fact adequately represented by parties who are present," *id.* at 43).

280 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613–19 (1997); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

281 *See, e.g.*, *Taylor*, 533 U.S. at 900–01 (rejecting an expansive view of "virtual representation" because it would "authorize preclusion . . . shorn of the procedural protections prescribed in," inter alia, Rule 23, *id.* at 901); *cf.* Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) (affirming idea that there is no common law class action).

Federal courts' experience applying modern Rule 23 across contexts is thus more than a convenient referent for habeas class actions. Even if Rule 23 does not apply of its own force, a court would still need to consider many of the same factors to ensure that the parties before it will adequately represent absentees who would be affected by a class-wide adjudication. Indeed, in disavowing universal injunctions in *Trump v. CASA*, the Supreme Court suggested in dicta that a "properly conducted class action . . . can come about in federal courts in just one way — through the procedure set out in Rule 23."[282] This language reinforces the point that federal courts should look to the *content* of Rule 23 for guidance in habeas class actions, as they have consistently done. Unlike the attempts to bind nonparties without class certification in *CASA*[283] and *Smith v. Bayer Corp.*,[284] the case from which *CASA* borrows the dictum,[285] nearly all courts that have authorized habeas class actions by analogy have done so after finding that they *satisfy* the requirements of Rule 23.[286] Crafting procedure by analogy to class action practice may give district courts more flexibility than does Rule 23, at least in certain circumstances.[287] But the basic values captured by Rule 23 are fundamental; the structure of the rule, as well as the caselaw interpreting and applying it, therefore provide a useful framework for analysis.

Habeas class actions will not always be appropriate. They have been relatively rare because postconviction cases — by far the most common habeas suits — often turn on procedural history and factual nuances that are highly individualized.[288] But when a similarly situated class of detainees challenges a detention policy on the same ground, a habeas class action is a natural and appropriate way to resolve their claims, efficiently and fairly.

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[282] 145 S. Ct. 2540, 2555 (2025) (quoting *Smith*, 564 U.S. at 315).

[283] *See id.* at 2556 ("[B]y forging a shortcut to relief that benefits parties and nonparties alike, universal injunctions circumvent Rule 23's procedural protections . . . .").

[284] 564 U.S. 299, 315 (2011) (holding that nonparties are not bound by decision *rejecting* class certification under Rule 23).

[285] We do not read this dictum to preclude habeas class action treatment under the All Writs Act or § 2243 for several additional reasons. First, we doubt that the Court would use dictum to resolve a longstanding question that it has repeatedly reserved, and in doing so to wipe away more than fifty years of uniform lower court practice. *See supra* section I.B, pp. 1512–18. Second, Justice Kavanaugh's *CASA* concurrence emphasized that courts retain authority to "grant[] . . . a preliminary injunction to a putative nationwide class under Rule 23(b)(2)," 145 S. Ct. at 2569 (Kavanaugh, J., concurring), which is actually authority that springs from the All Writs Act, *In re* Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985). And third, the full Court in *A.A.R.P. v. Trump* expressly held that the All Writs Act supplies authority to award preliminary relief to putative classes in a habeas case. 145 S. Ct. 1364, 1369 & n.1 (2025).

[286] *See supra* section I.B, pp. 1512–18.

[287] *See, e.g.*, United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1125 (2d Cir. 1974) ("To say that the precise provisions of Rule 23 do not apply to habeas corpus proceedings, however, is *toto caelo* different from asserting that we do not have authority to fashion expeditious methods of procedure in a specific case.").

[288] *See* Garrett, *supra* note 23, at 409–10.

A. Advantages of Habeas Class Action Adjudication

Our position is more than an argument that habeas class actions are *authorized*. It is also that they can be highly *desirable* — for both the courts adjudicating broad detention policies and the parties litigating them. Habeas class actions can be essential tools for dealing with recalcitrant government officials, reducing gamesmanship, and giving vulnerable people access to legal representation and substantive justice.

Habeas class actions are more efficient than individualized, repeated consideration of the same challenge to the same broad detention policy. If the basis for detaining the entire class is unlawful, then serially litigating identical questions is an expense without social value. A class action providing uniform resolution also avoids the risk of inconsistent judgments.[289] And it allows detainees to pool resources and operate collectively, thereby litigating on something closer to equal footing with the government.[290] Such advantages exist for any class action, but they are particularly important when a habeas class attacks a broad detention policy.

Here's why. Every habeas claimant asserts that the state has undertaken unlawful detention.[291] A government that adopts an unlawful detention *policy* is (by definition) detaining people who will have common legal claims, and it may also be more likely than in a one-off claim to engage in gamesmanship or exhibit recalcitrance when challenged. Such gamesmanship and recalcitrance were the historical problems for which Rule 23(b)(2) was the solution.[292] As most people know, intransigent Southern governments engaged in massive resistance to integration and other civil rights programs.[293] They routinely construed adverse court rulings narrowly, complying as to the formal parties but ignoring the decision's applicability to similarly situated individuals.[294] Rule 23(b)(2) class actions gave civil rights plaintiffs a tool to fight

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[289] *See* PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.07 cmt. h, at 164 (A.L.I. 2010).

[290] *See generally, e.g.*, Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) (explaining how class actions enable beneficial litigation). For an example of the structural disadvantges that disaggregated parties who cannot coordinate their actions face when they square off against repeat-player litigants like the government, see generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

[291] *See supra* notes 27–35 and accompanying text.

[292] *See infra* notes 389–392 and accompanying text.

[293] *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S 116–17 (1969); ANTHONY LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 43–45 (1964).

[294] *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 679–81, 706–07 (2011); Robert B. McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1085 (1956).

back — and gave federal courts a tool to see that their rulings applied to all of the targets of a discriminatory policy.[295]

If detainees subject to a broad, common detention policy are forced to litigate habeas claims individually, then familiar opportunities for gamesmanship abound. The government could release one plaintiff to moot litigation that would otherwise invalidate the detention policy.[296] Or it could move a detainee to a different part of the country to deprive the district court of venue under the "immediate custodian rule."[297] Or, if a habeas petitioner proceeding alone prevails on the shared ground, the government might simply release that person and continue to hold other detainees under the unlawful policy. The government may even withhold information about *which or how many* people are being detained under the policy.[298] And those detainees may not have the opportunity or wherewithal to challenge their detention without qualified legal help.

The AEA litigation again enriches the point. The Trump Administration moved AEA detainees around the country to avoid litigation in courts it considered unfavorable.[299] It removed AEA detainees from the country with little to no notice or opportunity to challenge their alien enemy designation,[300] disclaimed any ability to bring them back (even in cases of admitted mistake[301]), and ignored court orders in the

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[295] *See* Carroll, *supra* note 19, at 857–60.

[296] *Cf.* Preiser v. Newkirk, 422 U.S. 395, 403 (1975) (dismissing prisoners' rights case as moot after plaintiffs were released or transferred out of the maximum security institution); Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2036–38 (2015) (discussing risk of mootness before merits can be adjudicated).

[297] *See* Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004) (describing rule).

[298] *See* Amanda L. Tyler, *Jurisdiction and Remedy in* J.G.G. v. Trump, LAWFARE (Mar. 28, 2025, at 10:00 ET), https://www.lawfaremedia.org/article/jurisdiction-and-remedy-in-j.g.g.-v.-trump [https://perma.cc/E87Z-ZD8R].

[299] *See, e.g.*, Class Action Complaint and Petition for Writ of Habeas Corpus ¶¶ 9–13, J.G.G. v. Trump, 778 F. Supp. 3d 24 (D.D.C. 2025) (No. 25-cv-00766), Dkt. No. 1 (filed Mar. 15, 2025) (alleging that named plaintiffs were abruptly moved from detention facilities in California, Pennsylvania, and New York to the El Valle Detention Center in Texas); *see also* Opinion at 5, A.S.R. v. Trump, No. 25-cv-00113 (W.D. Pa. May 13, 2025) (noting petitioner's argument that "class members are frequently dispersed in different detention facilities prior to rapid staging for removal" (quoting Petitioner-Plaintiff's Memorandum of Law in Support of Motion for Class Certification at 9, A.S.R. v. Trump, No. 25-cv-00113 (W.D. Pa. Apr. 15, 2025))).

[300] *See* Memorandum Opinion at 7–9, J.G.G. v. Trump, 778 F. Supp. 3d 24 (D.D.C. 2025) (No. 25-cv-00766), Dkt. No. 81 (filed Apr. 16, 2025) (describing how Administration loaded AEA detainees on planes without notice and sent them to El Salvador while TRO hearing was ongoing).

[301] *See* Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025) (noting confessed error); Nelson Renteria, Diego Oré & Steve Holland, *El Salvador Blocks US Senator from Visiting Wrongly Deported Salvadoran Man*, REUTERS (Apr. 16, 2025, at 1:25 ET), https://www.reuters.com/world/americas/us-senator-lands-el-salvador-seeking-release-wrongly-deported-salvadoran-man-2025-04-16 [https://perma.cc/3V6N-RHTY] (reporting DHS position that the Administration could not bring Garcia back to the United States); *see also* DANA L. GOLD, ANDREA MEZA & KEVIN L. OWEN, GOV'T ACCOUNTABILITY PROJECT, PROTECTED WHISTLEBLOWER

process.[302] Even after *J.G.G.* held that AEA detainees are entitled to removal notices that permit meaningful habeas litigation,[303] the Administration *still* tried to remove detainees who didn't declare an intent to file a habeas petition within twelve hours as well as those who failed to actually file one within twenty-four.[304] And it asserted such authority even as it provided unrepresented AEA detainees — many of whom do not speak English — with English-only notices.[305] The formal opportunity for individualized habeas litigation affords no meaningful remedy for most of these people.[306]

A habeas class action can help address these problems. Detainee class treatment would prevent the government from mooting the case by releasing named plaintiffs, removing them beyond the court's jurisdiction, or agreeing not to apply the legally questionable aspects of the policy to them.[307] It would relieve class members — many detained without access to counsel — of the need to file their own suits. It would prevent a recalcitrant administration from persisting in unlawful detention by relenting only as to successful habeas petitioners. And perhaps most importantly, it would ensure that all AEA detainees have counsel. Without class representation, the administration could remove detainees before they have a realistic opportunity to object. But upon habeas class certification, the court would appoint class-wide counsel[308] who would

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DISCLOSURE OF EREZ REUVENI REGARDING VIOLATION OF LAWS, RULES & REGULATIONS, ABUSE OF AUTHORITY, AND SUBSTANTIAL AND SPECIFIC DANGER TO HEALTH AND SAFETY AT THE DEPARTMENT OF JUSTICE 1–2 (2025) [hereinafter REUVENI DISCLOSURE] (describing how government lawyer who conceded in court that Kilmar Abrego Garcia was removed in error was placed on administrative leave and eventually fired).

302 *See* Memorandum Opinion at 1, *J.G.G.*, 778 F. Supp 3d 24 (No. 25-cv-00766), Dkt. No. 81 (filed Apr. 16, 2025) (finding probable cause to hold Administration lawyers in criminal contempt for willfully defying court order to turn planes carrying AEA detainees around); *see also* REUVENI DISCLOSURE, *supra* note 301, at 7, 26 (describing DOJ leadership's knowledge of and willingness to defy court orders).

303 *See* Trump v. J.G.G., 145 S. Ct. 1003, 1006 (2025) (per curiam).

304 *See* Declaration of Assistant Field Office Director ¶ 11, J.A.V. v. Trump, 780 F. Supp. 3d 705 (S.D. Tex. 2025) (No. 25-cv-00072), Dkt. No. 49 (filed Apr. 24, 2025) ("[A]fter an alien is served with Form AEA 21-B, the alien is given a reasonable amount of time, and no less than 12 hours, including the ability to make a telephone call, to indicate or express an intent to file a habeas petition. If the alien does not express any such intention, then ICE may proceed with the removal . . . . If the alien does express an intent to file a habeas petition, the alien is given a reasonable amount of time, and no less than 24 hours, to actually file that petition. If the alien does not file such a petition within 24 hours, then ICE may proceed with the removal . . . .").

305 *See W.M.M.* Reconsideration Motion, *supra* note 71, at 13 ("A large number of detainees do not have lawyers and do not speak English. The government is planning to remove them a mere 12 or 24 hours after giving them an English-only form that does not tell them they can challenge their designation, how to do so, or on what timeframe.").

306 The ACLU, which is lead counsel in most of the AEA litigation, noted in their *W.M.M.* Reconsideration Motion that they are unaware of any AEA detainee who has successfully filed a habeas petition without the assistance of counsel. *Id.*

307 *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397–99 (1980) (recognizing that a habeas class action would preserve the court's own jurisdiction over "inherently transitory" claims, *id.* at 399, that may be mooted by a prisoner's release before the court has time to resolve them).

308 *See* FED. R. CIV. P. 23(g).

receive notice of removal and be capable of expeditiously protecting detainee interests.[309]

As to vulnerable detainees, then, there is a subtle (but powerful) distributive justification for class treatment. As Justice Jackson recently observed in her *CASA* dissent, the new bar on universal injunctions — which had served to block the application of unlawful policies to nonparties — does not impact the public equally.[310] It will have a disproportionate impact on "the poor, the uneducated, and the unpopular — *i.e.*, those who may not have the wherewithal to lawyer up, and will all too often find themselves beholden to the Executive's whims."[311] But the habeas class action can help balance the scales by ensuring representation for people who could not activate the judicial process on their own.

In recent decades, the Supreme Court has issued a string of decisions constricting class actions both directly, by increasing the bar for certification,[312] and indirectly, by channeling claims into arbitration.[313] But the Court's apparent skepticism toward class actions in the consumer, employment, and mass tort contexts is driven in large part by corporate and political backlash to damages class actions, with critics arguing that they produce unfair settlement pressure, attorney fee windfalls, and abusive litigation tactics.[314] Those concerns do not translate into the habeas class context, where there is no individual defendant with due process rights to protect and no massive attorneys' fees for lawyers to chase. Class actions seeking injunctive or declaratory relief against unlawful

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309 *See* Kovarsky & Rave, *supra* note 5.

310 Trump v. CASA, Inc., 145 S. Ct. 2540, 2604 (2025) (Jackson, J., dissenting).

311 *Id.*

312 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (holding that commonality requires "a common contention . . . capable of classwide resolution" and specifying that "Rule 23 does not set forth a mere pleading standard"); Comcast Corp. v. Behrend, 569 U.S. 27, 33–35 (2013) (emphasizing that trial courts must conduct "a rigorous analysis" of Rule 23 requirements, *id.* at 33 (quoting *Wal-Mart*, 564 U.S. at 350–51), and holding that damages models must measure only the damages attributable to plaintiffs' theory of liability); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (requiring all class members to demonstrate concrete harm to have Article III standing); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625, 627–28 (1997) (denying class certification for failure to meet predominance and adequacy). *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (explaining different ways by which courts have cut back on plaintiffs' ability to bring class action lawsuits in recent years).

313 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that California's prohibition on class action waivers in arbitration clauses is preempted by the Federal Arbitration Act); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 232, 238–39 (2013) (holding that courts cannot invalidate contractual waiver of class arbitration on ground that plaintiffs will incur prohibitive costs if compelled to individually arbitrate).

314 *See, e.g.*, ANDREW J. PINCUS, U.S. CHAMBER INST. FOR LEGAL REFORM, UNSTABLE FOUNDATION: OUR BROKEN CLASS ACTION SYSTEM AND HOW TO FIX IT 6–12, 17–19 (2017). The defense bar's aggressive campaign against class actions may be producing its own, more limited backlash in the judiciary, prompting courts to at least somewhat back off their hostility to class actions. *See* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 973–74 (2017).

government actions have been largely unaffected by the Court's recent "procedural retrenchment."[315]

Class actions will not be a fit for every group of prisoners with similar claims. Postconviction litigation, in particular, will remain largely unsuited to class action adjudication, as relief generally turns on individualized procedural history and law-to-fact application.[316] That is, prisoners will differ from one another in the underlying claims that they assert, and even common claims are subject to disposition that varies by reference to timeliness, exhaustion, forfeiture, and so forth. Each procedural question involves complex and individualized questions of law, and the complexity of those questions often dominates litigation.

Immigration detention is a split case, with class treatment appropriate for some types of litigation and inappropriate for others.[317] Subsection 1252(f), for example, bars class-wide injunctions against removal orders made under the Immigration and Nationality Act[318] (INA). Instead, Congress extensively specified individual remedies for INA removal, in 8 U.S.C. §§ 1221 to 1232. But AEA custody and removal do

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315 David Marcus, *The Class Action After* Trump v. CASA, 73 UCLA L. REV. DISCOURSE 2, 8–9 (2025); *see* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 781–82, 785 (2016).

316 *See* Garrett, *supra* note 23, at 406–08.

317 We recognize that there is a robust scholarly dispute over a separation of powers question: How much judicial review over immigration custody should there be? *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009) (urging that courts and scholars focus on power distribution between Congress and the President rather than simply between courts and the political branches); Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 HARV. L. REV. 1186, 1193 (2025) (parsing "whether the courts have properly assessed the will of the political branches" when extending principles for removal to collateral contexts); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 609–12, 623–26 (2017) (summarizing positions). Our argument is different. It is about who the parties to lawful habeas proceedings should be. It makes little sense to say that a single policy otherwise amenable to judicial review triggers a separation of powers objection simply because the legality of that policy can be interpreted in a single proceeding. And it makes especially little sense to pose a separation of powers objection when Congress, the entity generally recognized to have primary lawmaking authority over immigration, declines to impose a class action bar. *Cf.* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (describing "Congress' 'plenary power to make rules for the admission [and exclusion] of aliens'" (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967))); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [regulating immigration]."); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) (articulating traditional view of congressional power to regulate immigration).

318 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). Congress has stripped federal courts of jurisdiction to hear aggregated challenges to immigration detention under certain provisions of the INA; *see* 8 U.S.C. § 1252(f)(1) ("[N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221–1232] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."); Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (noting that "Section 1252(f)(1) . . . 'prohibits federal courts from granting classwide injunctive relief against the operation of'" the immigration detention scheme set forth in §§ 1221–1232 of the INA (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 481 (1999))). But the bar in § 1252(f)(1) does not cover challenges to immigration custody other than those specified in the select provisions of Title 8. *See* 8 U.S.C. § 1252(f)(1).

not proceed under Title 8; they proceed under Title 50.[319] Courts should and do draw a normal inference from the presence of a class action bar against INA but not AEA removal[320] — there is no class action bar against challenges to AEA detention.

The statutory distinction makes sense, too. Unlike INA removal, AEA removal is more likely to trace to a discrete government decision shared across the category of affected detainees. That causal nexus, often present in national security and other emergency-response cases,[321] explains why Congress would permit class-wide injunctive relief for people subject to removal under the AEA, but not the INA. In contrast to AEA removals, garden-variety removal proceedings are an immense administrative undertaking[322] and may need to be more insulated from additional layers of judicial review. And AEA detention is typically justified on national security grounds[323] that trigger habeas scrutiny.[324]

Any suggestion that the Executive might *want* to preclude judicial consideration is no answer, since the Supreme Court has most insisted on the availability of the habeas remedy in situations where Congress has otherwise limited judicial review.[325] When the government detains large groups pursuant to a single unlawful policy, a habeas class action can be a powerful counterweight to arbitrary detention — the core of what the Great Writ protects.

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319 *See* 50 U.S.C. §§ 21–24.

320 *Cf.* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 117–18 (2018) ("The Court has even expanded [the negative-inference canon] to compare the presence and absence of particular language across the U.S. Code.").

321 *See generally* GARRETT & KOVARSKY, *supra* note 27, at 621–712 (exploring habeas process applicable to military commission cases and other forms of "national security detention").

322 *See* Cox & Rodríguez, *supra* note 317, at 476 (attributing state of affairs to "increasing comprehensiveness of the statutory regime regulating immigration" and "increased delegation within that regime to executive officials").

323 *See* John Lord O'Brian, *New Encroachments on Individual Freedom*, 66 HARV. L. REV. 1, 9 (1952) (explaining how executive officials used national security rationales to detain "more than 2,500 dangerous alien enemies" during World War I).

324 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion) (stating that "due process demands that a citizen held in the United States as an enemy combatant be given meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker").

325 *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 779–81 (2008) ("The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context," *id.* at 781 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976))); Heikkila v. Barber, 345 U.S. 229, 234–36 (1953) (explaining that Congress had intended to strip habeas jurisdiction in deportation cases except for what was "required by the Constitution," *id.* at 235, and what was constitutionally required was judicial "enforcement of due process requirements," *id.* at 236); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (holding that immigration detainee was "doubtless entitled" to habeas proceeding notwithstanding statutory rule that deportation decisions were final).

B. Habeas and Rule 23's Requirements

We now turn to doctrine. A court certifying a Rule 23 class action must find that the proposed class meets the prerequisites set out in Rule 23(a) and that the class is a type authorized by Rule 23(b).[326] Habeas classes will generally proceed (directly or by analogy) under Rule 23(b)(2), which authorizes class actions where the defendant "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."[327] We discuss these subsections in some detail because they embed principles that apply whether Rule 23 is the formal source of authority for class treatment or not, and courts certifying habeas class actions under the All Writs Act or § 2243 have looked to these provisions for guidance.[328]

Rule 23's chief architect, Professor Benjamin Kaplan, certainly thought it would apply in habeas. Kaplan was the Advisory Committee Reporter, the primary draftsman of Rule 23,[329] and the author of the leading article explaining the 1966 amendments.[330] Kaplan cited two habeas class actions as "show[ing] good understanding in spelling out and applying the delimiting criteria" of the rule.[331]

1. Rule 23(a). — Rule 23(a) sets out four prerequisites for class action treatment: (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation.[332] They are designed to promote efficient resolution and ensure the fair treatment of absent class members.[333] Courts have long afforded class treatment to habeas claims that satisfy these prerequisites, as they should.[334]

Numerosity. Rule 23(a)(1) requires that the class be "so numerous that joinder is impracticable."[335] It recognizes that, while many

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326 *See* FED. R. CIV. P. 23.

327 FED. R. CIV. P. 23(b)(2). If a class of habeas claimants somehow met the requirements of subsections (b)(1) and (b)(3), nothing about the fact that their claims sound in habeas would preclude certification. But we focus on class actions challenging unlawful detention policies across the board, which fall most naturally into (b)(2).

328 *See supra* sections II.B.2–3, pp. 1527–32. Portions of this section are drawn from amicus briefs that we coauthored in other cases, and language might be quite similar. *See supra* note 1. For the reader's sake, we will avoid repetitive citations to those briefs.

329 *In re* Relafen Antitrust Litig., 231 F.R.D. 52, 84 (D. Mass. 2005) ("Born of the genius of Benjamin Kaplan, the legendary reporter to the Standing Advisory Committee on the Federal Rules at the time of their adoption in 1939, . . . Rule 23 has been hailed as perhaps the consumers' most potent procedural tool to check corporate misconduct." (footnote omitted)).

330 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833–34, 842–43, 844 n.20 (1999) (citing various pages of Kaplan, *supra* note 273); Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 613–16 (1997) (same).

331 *See* Kaplan, *supra* note 273, at 395 & n.151 (citing Adderly v. Wainwright, 272 F. Supp. 530 (M.D. Fla. 1967), and Hill v. Nelson, 272 F. Supp. 790 (N.D. Cal. 1967)).

332 *See* FED. R. CIV. P. 23(a).

333 *See, e.g.*, Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1981).

334 *See supra* section I.B, pp. 1512–17.

335 FED. R. CIV. P. 23(a)(1).

plaintiffs will prefer to participate directly in litigation, a representative suit can be preferable to fractured, ungainly processing of many lawsuits.[336] A single detainee has no need for a habeas class action,[337] but the numerosity requirement is satisfied when many people are detained pursuant to the same policy. Although there is no hard and fast minimum, courts regularly certify classes of forty or more members.[338] And the numerosity standard is more relaxed when a Rule 23(b)(2) class seeks injunctive or declaratory relief.[339] Where all class members subject to the challenged policy cannot be easily identified in advance, joinder would be particularly challenging and a class action may be the only practicable way to proceed.[340]

The AEA cases show why representative litigation is superior to joinder. The Trump Administration rounded up hundreds of Venezuelan nationals alleged to be members of TdA,[341] held them in detention facilities around the country,[342] and prepared to remove them on very short notice.[343] Using ordinary joinder rules to process their claims was practically impossible because the government refused to provide basic information about the identity, whereabouts, and number of detainees.[344] Representative litigation was the only practicable way for most of the detainees to meaningfully assert legal rights.

Commonality. Rule 23(a)(2) requires that "there are questions of law or fact common to the class."[345] For a class action to be efficient and fairly bind absent class members to the result of a single proceeding, there must be some common thread that ties all of their claims together.

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[336] *Cf.* Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979) ("[T]he Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. . . . And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every . . . beneficiary to be litigated in an economical fashion under Rule 23.").

[337] *Cf.* A.S.R. v. Trump, No. 25-cv-00113, 2025 WL 1385213, at *3–4 (W.D. Pa. May 13, 2025) (refusing to certify AEA habeas class where zero proposed class members were detained in the district and the named plaintiff had been moved elsewhere).

[338] *See, e.g.*, Stewart v. Abraham, 275 F.3d 220, 226–27 (3d Cir. 2001).

[339] *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 808 (3d Cir. 1984); Death Row Prisoners v. Ridge, 169 F.R.D. 618, 621 (E.D. Pa. 1996) (quoting Bacal v. Se. Pa. Transp. Auth., No. Civ. A. 94-6497, 1995 WL 299029, at *2 (E.D. Pa. May 16, 1995)).

[340] *See, e.g.*, Hawker v. Consovoy, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable." (citing Lanning v. Se. Pa. Transp. Auth., 176 F.R.D. 132, 148 (E.D. Pa. 1997))); *see also* 6 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:15 (6th ed. 2022) [hereinafter NEWBERG AND RUBENSTEIN] (noting that the impracticability of joining unidentified class members "may make class certification more, not less, likely").

[341] *See* Kinosian, Cooke & Hesson, *supra* note 62.

[342] *See* J.G.G. v. Trump, No. 25-5067, 2025 WL 914682, at *17 (D.C. Cir. Mar. 26, 2025) (Millett, J., concurring).

[343] *See* A.A.R.P. v. Trump, 145 S. Ct. 1364, 1366, 1368 (2025) (per curiam).

[344] *See supra* notes 71–75 and accompanying text (detailing challenges in identifying potential plaintiffs and ensuring their access to lawyers).

[345] FED. R. CIV. P. 23(a)(2).

But articulating some question that is common to the class (for example, are all the class members detained?) is not enough.

As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*,[346] the common question must be susceptible of a "common answer[] apt to drive the resolution of the litigation."[347] In other words, the class members' "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[348] In short, to be common, the question must be one "where 'the same evidence will suffice for each member'" to answer it.[349] And the answer to the common question must help resolve a contested part of the class claims.[350]

When a class of detainees lodges a common objection to the common policy under which they are detained, commonality should be no bar to class treatment. Determining the legality of the detention policy "will resolve an issue that is central to the validity of each one of the claims in one stroke."[351] Some misread *Wal-Mart* to preclude class treatment when class members have "dissimilarities"[352] — and opponents of class certification often highlight every individualized feature of every class member's claim.[353] But in analyzing commonality under Rule 23(a)(2), a court does not tally up the number of individual issues and decide whether they predominate over the common ones.[354] As *Wal-Mart* emphasized, "'[e]ven a single [common] question' will do."[355]

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[346] 564 U.S. 338 (2011).

[347] *Id.* at 350 (emphasis omitted) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

[348] *Id.*

[349] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (quoting 2 WILLIAM RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. 2011)).

[350] *See id.*; *cf.* Speerly v. Gen. Motors, LLC, 143 F.4th 306, 318 (6th Cir. 2025) (en banc) (stating that "[a] court may not simply ask whether generalized questions yield a common answer" but "must identify common questions with respect to concrete elements of each claim").

[351] *Wal-Mart*, 564 U.S. at 350.

[352] *Id.* at 359 ("We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is '[e]ven a single [common] question.'" (alterations in original) (emphasis omitted) (quoting Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 176 n.110 (2003))).

[353] *See, e.g.*, W.M.M. v. Trump, 782 F. Supp. 3d 370, 392–98, 398 n.6 (N.D. Tex.) (finding habeas class failed to satisfy Rule 23(a) under *Wal-Mart* because of dissimilarities in petitioners' claims), *vacated and cert. granted sub nom.*, A.A.R.P. v. Trump, 145 S. Ct. 1364 (2025).

[354] Some types of class actions — in particular class actions seeking monetary damages — have additional requirements spelled out: In Rule 23(b)(3) class actions, common questions must predominate over individual ones and the class action must be superior to other methods for adjudicating the controversy. *See* FED. R. CIV. P. 23(b)(3). But predominance and superiority are not prerequisites for *all* class actions, and they are not prerequisites for class actions formed under Rule 23(b)(2).

[355] 564 U.S. at 359 (alterations in original) (quoting Nagareda, *supra* note 352, at 176 n.110).

Class actions falter on commonality grounds when the answer to the common question turns on "evidence that varies from member to member" or where different substantive laws define the elements of different class-member claims.[356] Facing that type of variation, courts have declined to certify class actions in pattern-or-practice employment discrimination claims or product liability suits.[357] But when a class facially challenges the legality of an across-the-board policy, there is Rule 23 commonality. As Professor David Marcus has observed, "proposed classes in cases challenging uniform, across-the-board policies have enjoyed overwhelming success since *Wal-Mart*."[358]

The AEA litigation is again conceptually useful. The AEA plaintiffs claim that their AEA detention and removal are illegal as to *all* of them.[359] Though their claims sound in habeas, their allegations raise common questions perfectly suited to class action treatment. These questions are the ones recited in section I.A: whether TdA counts as a "foreign nation or government," whether there has been an "invasion or predatory incursion," what due process requires before someone is removed under the AEA, whether AEA removal impermissibly circumvents Title 8 restrictions, and whether individuals removed under the AEA are entitled to screenings for torture.[360]

Resolving these questions on a classwide basis will be "central to the validity" of each class member's claim.[361] And these questions do not require different class members to present different evidence. TdA is a "foreign nation," or it is not. Its American activity is a "predatory incursion," or it is not. The President's Proclamation complies with the AEA, or it does not. Due process permits removal on some quantum of notice and process, or it does not. People facing removal are entitled to torture screenings, or they are not. These questions do not have different answers for different class members.

Typicality. Rule 23(a)(3) requires the class representative's claims to be typical of those belonging to the class.[362] When a named plaintiff shares a facial challenge to the same policy under which the other class members are detained, the representative is typical within the meaning of Rule 23(a). The typicality standard overlaps with commonality. The

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[356] Speerly v. Gen. Motors, LLC, 143 F.4th 306, 318 (6th Cir. 2025) (en banc) (quoting Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016)) (vacating and remanding certification of multistate class action on commonality grounds where district court did not analyze how different states' laws applied to different class members' claims, *see Speerly*, 143 F.4th at 318–19).

[357] *See, e.g.*, *Wal-Mart*, 564 U.S. at 359 (refusing certification); *Speerly*, 143 F.4th at 318–19 (same).

[358] Marcus, *The Class Action After Trump v. CASA*, *supra* note 315, at 16 & n.66 (surveying class certification decisions in facial challenges and finding that plaintiffs uniformly prevailed on commonality with one exception due to a faulty class definition).

[359] *See A.A.R.P.* Complaint, *supra* note 77, ¶ 70.

[360] *See supra* note 63 and accompanying text.

[361] *Wal-Mart*, 564 U.S. at 350.

[362] FED. R. CIV. P. 23(a)(3).

Supreme Court has noted that the two prerequisites "tend to merge" with each other, and with Rule 23(a)(4)'s requirement of adequate representation.[363] The purpose of the typicality requirement is to ensure that the self-interest of the class representative aligns with the interests of the absent class members whom they are supposed to represent.[364]

But the typicality requirement does not mean that the class representative must be identical to the absent class members in every way. In *General Telephone Co. of the Southwest v. Falcon*,[365] the Supreme Court explained that the "class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members," so that, in pursuing their own claims, the named plaintiff will advance the class's interests.[366] When a class of detainees brings a facial challenge to the policy under which they are all detained, a representative detainee will have the same claims and injury as the rest of the class.

Again, the AEA litigation illustrates the appropriate function of the typicality requirement. The named plaintiffs were Venezuelan nationals detained under the President's Proclamation because they were alleged to be TdA members.[367] They were challenging the legality of that Proclamation under the AEA and Constitution, such that they alleged the same claims and injury as the rest of the class.[368] In advancing their own claims, they would advance the class's interest at the same time. Even if the named plaintiffs had additional claims involving individualized proof — such as evidence that they were not TdA members — they would not become atypical. They would still advance the common claims effectively. If the plaintiffs prevail on their facial challenges to the Proclamation and its implementation, then resolving fact-specific, individual issues about TdA membership is unnecessary.

Adequacy. Finally, Rule 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class."[369] Recall that the adequate-representation requirement "tend[s] to merge" with the commonality and typicality requirements.[370] It is, after all, the fundamental constitutional requirement that the rest of Rule 23 is designed

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363 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

364 John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1424 (2003) ("Typicality makes explicit the central idea underlying the theory of interest representation: The named plaintiff is not permitted to represent the class unless his interest is essentially the same as those of the unnamed members of the class.").

365 457 U.S. 147 (1982).

366 *Id.* at 156 (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)). In *Falcon*, the Court found that the class representative's claims were not typical of a class of Mexican Americans alleging unlawful discrimination in hiring because he *was*, in fact, hired. *See id.* at 158–59.

367 *See generally* Kovarsky & Rave, *supra* note 5 (describing this AEA litigation).

368 *See id.*

369 FED. R. CIV. P. 23(a)(4).

370 *Falcon*, 457 U.S. at 157 n.13.

to promote.[371] But the adequate-representation requirement reminds courts to ensure that the class representative's interests do not conflict with those of the class.[372] In fact, one advantage class actions have over individual litigation is that the court monitors, on behalf of absent class members, the loyalty of both the class representative and class counsel.[373]

There is nothing inherent about habeas litigation that precludes a finding of adequate representation when there is a typical plaintiff asserting a claim common to the class. Recall that the habeas statute even includes a provision permitting a prisoner to be represented "by someone acting in his behalf."[374] In the AEA litigation, for example, the named plaintiffs have an interest in having the operative Proclamation declared unlawful and enjoined, and they operate "on behalf" of the class with that same interest.[375]

2. Rule 23(b)(2). — A class action that meets the prerequisites of Rule 23(a) must also fall within one of the three categories authorized by Rule 23(b).[376] The first category, specified in Rule 23(b)(1), captures the historical justifications for class action treatment.[377] A (b)(1) class is for when individual adjudications either (A) might subject the defendant to incompatible standards of conduct or (B) would, as a practical matter, impair the interest of nonparties.[378] (An example of the second subtype is a "limited fund" scenario.[379]) Because individual litigation would be unworkable without affecting the rights of absent class members, Rule 23(b)(1) classes are mandatory; class members may not opt out.[380]

The third category, Rule 23(b)(3), captures the most familiar,[381] and probably most controversial,[382] form of class treatment — the opt-out

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371 *See supra* notes 279–280 and accompanying text.

372 *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626–28 (1997).

373 *See id.* at 626–28, 626 n.20; *see also, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (describing the judge's role in this regard as "fiduciary," *id.* at 280).

374 28 U.S.C. § 2242.

375 *See A.A.R.P.* Complaint, *supra* note 77, ¶¶ 66–67.

376 FED. R. CIV. P. 23(b).

377 *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendments; Carroll, *supra* note 19, at 848.

378 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (quoting FED. R. CIV. P. 23(b)(1)(A)–(B)).

379 *Id.*

380 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 & n.13 (1999); Nagareda, *supra* note 352, at 232. *Compare* FED. R. CIV. P. 23(c)(2)(A) (providing that "the court may direct appropriate notice" to (b)(1) and (b)(2) classes), *with* FED. R. CIV. P. 23(c)(2)(B)(v) (providing that "the court must direct to [(b)(3)] class members the best notice that is practicable," FED. R. CIV. P. 23(c)(2)(B), so they can opt out of the class).

381 *See* EMERY G. LEE III ET AL., FED. JUD. CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS 3 & 4 tbl.2 (2008), https://www.fjc.gov/sites/default/files/2012/CAFA1108.pdf [https://perma.cc/S5JT-7HRU].

382 *See* Report from Hon. Robin L. Rosenberg, Chair, Advisory Comm. On Civ. Rules, to Hon. John D. Bates, Chair, Comm. On Rules of Prac. & Procedure, Report of the Advisory Committee on Civil Rules (May 11, 2023), https://www.uscourts.gov/sites/default/files/advisory_committee_on_civil_rules_-_may_2023_0.pdf [https://perma.cc/2EL4-HUAP] ("[D]uring its first years in operation, Rule 23(b)(3) generated substantial controversy.").

class action.[383] Opt-out class actions are for when plaintiffs seek divisible relief like monetary damages, and (b)(3) classes trigger additional requirements and protections.[384] Crucially, to certify a (b)(3) class action, the court must find that common questions "*predominate*" over individual ones and that a class action is "*superior* to other available methods" of adjudicating the controversy.[385] Because potential class members might prefer individual control over the timing, presentation, and resolution of their own claims to divisible relief, they are entitled to notice and the opportunity to opt out of the class.[386]

Habeas class actions, which involve *in personam* orders operating against custodians, fit naturally into the second category — Rule 23(b)(2). Rule 23(b)(2) authorizes class action treatment where the defendant "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."[387] All of the habeas class action cases that we reviewed followed the Rule 23(b)(2) model.[388]

Rule 23(b)(2) was added to the Rules in 1966, and it was specifically designed to improve remediation in civil rights cases.[389] The promulgators of Rule 23(b)(2) recognized the limits of splintered civil rights litigation against unlawful governmental policies.[390] Before Rule 23(b)(2), recalcitrant state officials would often comply with an injunction or declaration against a discriminatory policy as to the victorious plaintiff, but ignore it as to everyone else.[391] Rule 23(b)(2) allows courts to remedy unlawful discrimination through "a single classwide order."[392] Like Rule 23(b)(1) classes, (b)(2) classes seeking injunctive or declaratory relief are mandatory; absent class members have no opportunity to opt out.[393]

When a group of detainees shares a common challenge to the same detention scheme, the whole class would be entitled to (1) the same declaration that the detention policy is unlawful and (2) identical *in personam* orders against the jailer. The habeas remedy therefore functions

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383 *See* FED. R. CIV. P. 23(c)(2)(B), 23(c)(2)(B)(v).

384 *See* FED. R. CIV. P. 23(b)(3), 23(c)(2)(B); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011).

385 FED. R. CIV. P. 23(b)(3) (emphases added).

386 *See* FED. R. CIV. P. 23(c)(2)(B); FED. R. CIV. P. 23 advisory committee's note to 1966 amendments.

387 FED. R. CIV. P. 23(b)(2).

388 *See supra* section I.B, pp. 1512–18 (reviewing habeas class action cases).

389 *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendments ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

390 *See, e.g.*, Marcus, *supra* note 294, at 706–07.

391 *See id.* at 706.

392 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 361 (2011).

393 *See* FED. R. CIV. P. 23(c)(2)(A); Carroll, *supra* note 19, at 853.

like "injunctive relief or corresponding declaratory relief."[394] It instructs custodians to do or refrain from doing something in view of whether the detention is declared lawful.[395] Scaling the habeas remedy up to a class-wide order fits comfortably within the tradition of Rule 23(b)(2).[396]

As the Supreme Court explained in *Wal-Mart*: "The key to the (b)(2) class 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.'"[397] When the class shares a claim that the executive policy under which they are all detained is facially unlawful, that question has an indivisible answer. The Executive either has the authority, or it does not; the policy either is lawful, or it is not. Those questions don't have different answers for different class members. A "single injunction or declaratory judgment" resolving those questions would thus "provide relief to each member of the class."[398] Repeated litigation of those questions would only breed delay, risk inconsistent judgments, and block vulnerable detainees from justified remedies.[399]

It is true that, even in a challenge to an across-the-board policy, one detainee could obtain release without *necessarily* affecting the rights of others detained pursuant to the same policy. It would not be *impossible* for the government to release the petitioner while continuing to hold everyone else. One detainee could obtain a remedy while others do not. But Rule 23(b)(2) has never required that sort of logical indivisibility as to remedy.[400] What *would* be impossible is for a court to determine that the petitioner is entitled to release because the policy is facially unlawful while simultaneously determining that everyone else held under the same policy is lawfully detained. In other words, the common question

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394 *See* FED. R. CIV. P. 23(b)(2).

395 *See* Boumediene v. Bush, 553 U.S. 723, 745–46 (2008) (citing and quoting *In re* Jackson, 15 Mich. 417, 439–40 (1867) (Cooley, J., concurring)) ("The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailer." (alteration in original)); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 713 (2008) ("[T]he central concern of Anglo-American habeas cases had been with the status of the incarcerating official, not that of the prisoner.").

396 Whether habeas corpus is technically an equitable remedy like an injunction or a legal one derived from common law writs, Rule 23(b)(2) provides the appropriate framework for considering class treatment. *Wal-Mart* made clear that the appropriateness of a Rule 23(b)(2) class action does not turn on whether the remedies sought would have been historically categorized as "equitable" or "legal." *See Wal-Mart*, 564 U.S. at 365 (explaining that the fact that "a backpay award is equitable in nature . . . is irrelevant"). The relevant question is whether the same relief can be afforded to the whole class "in one stroke." *Id.* at 350.

397 *Id.* at 360 (quoting Nagareda, *supra* note 347, at 132).

398 *Id.*

399 *Cf.* Marcus, *supra* note 294, at 706–07 (describing similar problems faced by civil rights plaintiffs before Rule 23(b)(2) was adopted).

400 *See* Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 78–81 (2019).

(the lawfulness of the detention policy) has an indivisible answer (yes or no). That is the kind of indivisibility Rule 23(b)(2) requires.[401]

For a useful example, take a hypothetical from the Supreme Court's recent opinion in *Trump v. CASA*, which rejected universal injunctions.[402] Consider a nuisance suit "in which one neighbor sues another for blasting loud music at all hours of the night. To afford the plaintiff complete relief, the court has only one feasible option: order the defendant to turn her music down — or better yet, off."[403] As a practical matter, the remedy is indivisible: The order to shut off the music "will necessarily benefit the defendant's surrounding neighbors too; there is no way 'to peel off just the portion of the nuisance that harmed the plaintiff.'"[404] But such "endpoint indivisibility,"[405] where it is "'all but impossible' to devise relief that reaches only the plaintiffs,"[406] has never been the standard for a Rule 23(b)(2) class action.[407] Indeed, a class action adds little in cases of endpoint indivisibility. As the Court acknowledges in *CASA*, any one of the neighbors could, in obtaining complete relief for herself, as a practical matter obtain relief for the class.[408]

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401 In *Wal-Mart*, the Court adopted Professor Richard Nagareda's concept of "indivisibility." *See Wal-Mart*, 564 U.S. at 360 (quoting Nagareda, *supra* note 347, at 132). Nagareda has explained: "Properly conceived, mandatory class treatment proceeds from the recognition that it is not possible to ascertain the legality of the defendant's conduct as to one affected claimant without necessarily doing so as to all others." Nagareda, *supra* note 352, at 232. That is why, as *Wal-Mart* notes, Rule 23(b)(2) does not require a judicial finding of predominance and superiority, which are the touchstones of Rule 23(b)(3) damages classes. "When a class seeks an indivisible injunction benefitting all its members at once . . . [p]redominance and superiority are self-evident." *Wal-Mart*, 564 U.S. at 362–63.

402 145 S. Ct. 2540, 2548 (2025).

403 *Id.* at 2557.

404 *Id.* (quoting Rodgers v. Bryant, 942 F.3d 451, 462 (8th Cir. 2019) (Stras, J., concurring)) (citing Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 702 (2004)).

405 Carroll, *supra* note 400, at 77.

406 *CASA*, 145 S. Ct. at 2565 (Thomas, J., concurring).

407 *See* Carroll, *supra* note 400, at 78–81.

408 *CASA*, 145 S. Ct. at 2557 ("[T]he court's injunction might have the *practical effect* of benefiting nonparties . . . ."); *see also id.* at 2564–65 (Thomas, J., concurring) ("I do not dispute that there will be cases requiring an 'indivisible remedy' that incidentally benefits third parties . . . such as '[i]njunctions barring public nuisances.'" (second alteration in original) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring)). Rule 23(b)(1)(A) was designed to cover such situations of endpoint indivisibility. It authorizes class treatment when individual suits could subject the defendant to inconsistent standards of conduct — e.g., one court says the defendant has a right to play music while another orders him not to — in order to guarantee two-way preclusion. *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921) ("If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree."); FED. R. CIV. P. 23 advisory committee's note to 1966 amendment ("One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class."); Carroll, *supra* note 400, at 77–78.

Instead, Rule 23(b)(2) requires only what Professor Maureen Carroll has termed "root-cause indivisibility."[409] Root-cause indivisibility exists when the defendant has acted in some common way toward the class as a whole so that its "conduct could not be lawful as to one class member and unlawful as to others."[410] Even though a court could theoretically enjoin the defendant's conduct as to one plaintiff while allowing it to continue as to others, the court could not "declare the conduct unlawful as to one class member without also deeming it unlawful as to all others."[411] The common question — whether the defendant's conduct was lawful — has an indivisible answer: yes or no. The answer is not different for different class members. In fact, Rule 23(b)(2) was designed precisely for such situations, where a recalcitrant defendant might try to evade the force of the court's ruling by complying as to the formal parties, but continuing its unlawful conduct as to everyone else.[412]

Indeed, the recalcitrant defendant that continued to act unlawfully against nonparties was a common phenomenon in the civil rights cases that led to the 1966 amendments to Rule 23.[413] As the Supreme Court has observed on multiple occasions: "'[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture."[414] The drafters of modern Rule 23 recognized that individual litigation "would . . . be inadequate and inefficient" in civil rights cases.[415]

To understand their thinking and the operation of Rule 23(b)(2), consider desegregation litigation. If a Black student, suing on her own, prevailed in her challenge to the policy excluding her from an all-white school, her injury would be redressed by admitting her — and only her — to that school.[416] But forcing every Black student to litigate to judgment their own right to attend an integrated school against the wishes of a recalcitrant state government would entail intolerable delay and expense. And it would place an unfair burden on class members, forcing them to prove again and again the illegality of the same government policy. The Rule 23(b)(2) class action was created with the express purpose of alleviating those burdens.[417]

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409 Carroll, *supra* note 400, at 66.

410 *Id.*; *see also id.* at 81–87 (explaining situations in which root-cause indivisibility applies).

411 *Id.* at 66.

412 *See* Marcus, *supra* note 294, at 706–07; *cf.* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment ("[Rule 23(b)(2)] is intended to reach situations where . . . settling the legality of the behavior with respect to the class as a whole, is appropriate . . . . Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class . . . .").

413 *See* Marcus, *supra* note 294, at 706–07.

414 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 361 (2011) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)).

415 Kaplan, *supra* note 273, at 389.

416 *See* Carroll, *supra* note 400, at 79.

417 *See* Marcus, *supra* note 294, at 701.

Courts routinely certify Rule 23(b)(2) class actions when plaintiffs challenge the legality of across-the-board government policies. As with Rule 23(a) commonality cases, Marcus's post-*Wal-Mart* survey of cases revealed that "in no opinion published in the twenty-first century . . . has a federal court of appeals ruled against plaintiffs on Rule 23(b)(2) grounds in a case challenging a uniform, across-the-board policy."[418]

The same considerations apply in habeas cases when the legality of a government policy turns on a question common to the detainees. Under those circumstances, Rule 23(b)(2) class treatment is superior to the duplicative litigation of individual habeas petitioners. It is more efficient for the courts. It avoids mootness problems when a particular plaintiff is released (or removed beyond the court's jurisdiction) before the litigation concludes. It prevents a potentially recalcitrant defendant from complying with a court order in one detainee's case but continuing unlawful detention in others. And it relieves class members — many of whom may be detained without access to counsel — of the need to file separate suits just to prove exactly what similarly situated detainees have already proven.

We conclude with an AEA illustration. The AEA plaintiffs claimed that the operative Proclamation is unlawful as to all class members.[419] They challenged the policy across the board, asserting that it violates various features of both the Constitution and the AEA itself.[420] If the plaintiffs prevail, then a court could theoretically order the release of the named plaintiffs and not others. But a determination that TdA is not a "foreign nation" or that its American activity is not a "predatory incursion" would necessarily apply to all AEA detainees the same way.[421] The answers to those questions are indivisible — they do not vary from one class member to another. Thus, "a single injunction or declaratory judgment" resolving those questions "would provide relief to each member of the class," just as Rule 23(b)(2) requires.[422]

*C. Flexibility in a Post-*CASA *Era*

Habeas litigation has a well-deserved reputation as complex and specialized,[423] even as it facilitates the basic legal principle that the state

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418 Marcus, *The Class Action After Trump v. CASA*, *supra* note 315, at 17 (emphasis omitted).

419 *A.A.R.P.* Complaint, *supra* note 77, ¶ 70.

420 *Id.*; *see id.* ¶¶ 75–104 (listing eight claims for relief on statutory and constitutional grounds).

421 *See supra* note 60 and accompanying text.

422 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).

423 *See, e.g.*, A.B.A., *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 936 (2003) ("But federal habeas corpus actions are governed by a complex set of procedural rules."); Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 232 (2007) (calling capital habeas lawyering a "[h]ighly [s]pecialized [j]ob").

cannot undertake unlawful detention.[424] But the Federal Rules in general — and Rule 23 in particular — give courts broad flexibility to manage complex disputes.[425] With those tools, federal courts can meet the challenges raised by habeas classes without recreating the problems that caused the Supreme Court to throttle universal injunctions. We discuss three of those challenges in this section: claims that raise a mix of common and individual issues, the geographic scope of relief, and the need for expedited rulings.

1. Individual Issues. — Habeas corpus often looks like a highly individualized remedy. It gives a detainee a personal right to demand release unless the government produces lawful reasons for detention.[426] And relief will often turn on fact-bound issues specific to each detainee's situation. In the postconviction context, for example, the merit of an underlying constitutional claim often turns on case-specific details about the investigation,[427] prosecutor tactics,[428] defense lawyering,[429] trial adjudication,[430] and so forth. Individualized procedural determinations about timeliness,[431] forfeiture,[432] exhaustion,[433] and impermissible successiveness[434] may be antecedent to any common questions. Even claimants challenging generally applicable features of broad detention policies may present individual issues, just as they could in a nonhabeas class action. Look no further than the AEA litigation. The plaintiff classes there challenge AEA detention on broad legal grounds,[435] but individual class members may also claim that they are not TdA members and therefore not subject to the Proclamation.

But we return to a point that we emphasize throughout: Class treatment of detainees with common claims can be appropriate even when they also raise individual issues. The class action rules afford courts

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424 *See supra* notes 27–36 and accompanying text.

425 *See* FED. R. CIV. P. 16(c)(2)(L), 23(d); *cf.* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (describing trend toward flexible case management); D. Theodore Rave, *Management and Judging in Multidistrict Litigation*, 42 REV. LITIG. 291, 316 (2023) (describing federal courts' flexible case management authority in all cases). *See generally* MANUAL FOR COMPLEX LITIGATION (Fourth) (2004) (describing flexible and innovative case management techniques for complex cases).

426 *See* 28 U.S.C. § 2243 (requiring "respondent to show cause why the writ should not be granted").

427 *See, e.g.*, Townsend v. Sain, 372 U.S. 293, 307 (1963) (adjudicating relief for claim that state obtained an involuntary confession), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

428 *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 422 (1995) (adjudicating relief for claim that prosecutor failed to disclose material evidence favorable to defense).

429 *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 514 (2003) (adjudicating relief for claim that defense counsel failed to sufficiently investigate and present mitigation evidence).

430 *See, e.g.*, Andrew v. White, 145 S. Ct. 75, 78 (2025) (adjudicating claim for relief that trial court improperly admitted unduly prejudicial evidence).

431 *See* 28 U.S.C. § 2244(d) (statute of limitations).

432 *See* Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) (forfeiture).

433 *See* 28 U.S.C. § 2254(b) (exhaustion).

434 *See* 28 U.S.C. § 2244(b) (successiveness).

435 *See A.A.R.P.* Complaint, *supra* note 77, ¶¶ 75–104.

flexibility to address common issues without ruling on individual ones. In particular, Rule 23(c)(4) allows the court to certify "a class action with respect to particular issues."[436] When a court certifies an issue class, it can decide questions common to the class and leave individual issues for later adjudication.[437] In the AEA litigation, for example, a court could certify a class to decide common questions like whether TdA counts as a "foreign nation or government" or whether it has engaged in an "invasion or predatory incursion,"[438] while leaving questions about whether a particular class member is part of TdA for individualized adjudication.

If the AEA class were to prevail on a common issue, then individualized questions of TdA membership would not affect the remedy. If the class were to lose on the common questions, however, then individual class members could still argue that they are not, in fact, part of TdA. It is black-letter law that class treatment of a common issue precludes relitigation of only *that* issue, and "does not preclude later lawsuits by class members concerning individualized claims."[439] What's more, there is no claim preclusion in habeas cases.[440] Absent statutory provisions like those for postconviction claims,[441] detainees are allowed to bring successive challenges to the same detention. So, win or lose, a judgment in a habeas class action would not preclude absent class members from later asserting individual claims that the class failed to raise.[442] When habeas class litigation mixes common and individual issues, courts have the flexibility to craft issue classes for common questions without prejudicing the ability of class members to raise individual ones.

Of course, not every habeas claim will be amenable to issue class treatment. Rule 23(c)(4) empowers courts to certify issue classes "[w]hen appropriate."[443] An issue class is "appropriate" when it "will materially

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436 FED. R. CIV. P. 23(c)(4).

437 *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012) (certifying issue class for injunctive relief under Rule 23(b)(2) and (c)(4), while leaving individual questions of entitlement to backpay for potential follow-on proceedings), *abrogated on other grounds by* Phillips v. Sheriff of Cook Cnty., 828 F.3d 541 (7th Cir. 2016).

438 These are the conditions the AEA specifies for lawfully invoking the Act. *See* Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24).

439 NEWBERG AND RUBENSTEIN, *supra* note 340, § 18:17.

440 *See* Sanders v. United States, 373 U.S. 1, 8 (1963) ("The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ.").

441 *See, e.g.*, 28 U.S.C. § 2244(b)(2) (making up for absence of res judicata with statutory preclusion rules for postconviction cases).

442 The rule in *Sanders v. United States*, 373 U.S. 1 (1963), would not undermine the issue preclusive effect of the judgment in a habeas class action. Absent class members (as well as the defendant) would be bound in a successive petition by the resolution of issues actually determined on the merits in the class action, as long as "the ends of justice" would be served. *See id.* at 15. So an issue class in a habeas case would still secure two-way preclusion for the issues certified for class treatment.

443 FED. R. CIV. P. 23(c)(4).

advance the disposition of the litigation as a whole."[444] That will not be the case for all habeas classes. For example, and as discussed above, individualized case history might render a postconviction claim untimely, unexhausted, procedurally defaulted, or impermissibly successive.[445] Any of these procedural defects would be antecedent to relief on the merits of a shared substantive claim,[446] so Rule 23(c)(4) certification could not provide class-wide relief.

The logical antecedence of such individualized issues undermines the efficiency rationale for class treatment of the common downstream question.[447] But when individualized issues are not antecedent, meaning that issue class treatment resolves an upstream issue dispositive of, or central to, each class member's claim, the efficiency of class action treatment is apparent: It might obviate the need to decide *any* individual issues.

In short, courts can use the flexibility built into Rule 23 to accommodate individual issues that might arise in habeas cases — just like they do in other class actions.

2. Geographic Scope of Relief. — In the run-up to *CASA*, one common objection to the use of universal injunctions related to the geographic scope of relief. A universal injunction prohibits the government from enforcing the challenged law or policy, against not only the particular plaintiffs in the lawsuit but "against *anyone*, anywhere."[448] Universal injunctions combined with aggressive forum shopping produce something particularly troubling: Plaintiffs could handpick district judges capable of completely disabling contested policies, at least temporarily.[449] An outlier judge could stop a national policy initiative in its tracks, even if most other judges would have stayed their hands.[450] Such scenarios created pressure for fast-tracked Supreme Court review, thereby eliminating "percolation" in the lower courts.[451] Nationwide class actions seeking to enjoin governmental policies across the board

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444 NEWBERG AND RUBENSTEIN, *supra* note 340, § 4:92.

445 *See supra* notes 431–434 and accompanying text.

446 *See, e.g.*, Calderon v. Ashmus, 523 U.S. 740, 747–48 (1998) (describing such antecedence with respect to exhaustion).

447 *Cf.* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (explaining that commonality requires "common *answers* apt to drive the resolution of the litigation" (quoting Nagareda, *supra* note 347, at 132)).

448 *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2549 n.1 (2025) (citing Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 338 (2018)).

449 *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 457–61 (2017) (analyzing incentives for forum shopping); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1104–06 (2018) (analyzing "forum shopping" as a "cost[]" of nationwide injunctions).

450 *See* Bray, *supra* note 449, at 459–60.

451 *Id.* at 461–62 (quoting Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975)).

may have similar effects.[452] We take no position on the value of percolation more broadly.[453] But to the extent that forum shopping for nationwide relief tends to short-circuit percolation, and if percolation is valuable, then habeas class actions have the virtue of geographically limited scope.

When habeas claimants satisfy the criteria for class certification, their cases will tend to max out as district-wide classes. Under the so-called "immediate custodian rule," the proper habeas respondent is the official in charge of the facility holding the prisoner,[454] and the proper venue is the federal district in which that facility sits.[455] COVID-19 litigation, for example, generally involved facility-wide habeas classes, because the contested conditions of confinement were common only to detainees at a single facility.[456] But even if detainees challenge broader policies that apply nationwide — as in the AEA litigation — courts may be reluctant to certify broad classes where respondents are from different districts.

We do not mean to rule out the possibility of statewide or nationwide habeas classes. Such classes might be appropriate in certain circumstances, especially if the logical respondent is a federal officer with nationwide control or if immediate custodians reside in different districts of the same state.[457] Because the Supreme Court's immediate custodian decisions are imprecise on a number of crucial points — including the content, scope, and juridical status of the rule itself[458] — there is play

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[452] *See* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 633–34 (2017). *But see* Califano v. Yamasaki, 442 U.S. 682, 702–03 (1979) (affirming certification of a nationwide (b)(2) class, noting that "injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class," *id.* at 702); Marcus, *The Class Action After Trump v. CASA*, *supra* note 315, at 31–32 (defending *Califano*).

[453] We confess some skepticism about how much value percolation actually adds when parties challenge major new federal statutes or executive action. As Justice Kavanaugh admitted in his candid *CASA* concurrence, the underlying legal questions are going to be decided by the Supreme Court sooner rather than later, with or without the considered opinions of lower court judges. 145 S. Ct. at 2567–68 (Kavanaugh, J., concurring).

[454] Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004).

[455] Justices Kennedy and O'Connor provided the fourth and fifth votes in support of the Court's opinion in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and they concurred to underscore that the immediate custodian rule was better understood as a rule of personal jurisdiction or venue. *See id.* at 451–52 (Kennedy, J., concurring). *But see id.* at 442–47 (majority opinion) (discussing, with some ambiguity as to the specific jurisdictional form at issue, the immediate custodian rule as a form of jurisdictional limitation). The venue paradigm seems to have prevailed, because it is the one the Court adopted in *Trump v. J.G.G.*, 145 S. Ct. 1003 (2025). *See id.* at 1006.

[456] *See supra* note 126 (collecting cases).

[457] *See* 28 U.S.C. § 1391(b)(1) (permitting venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located").

[458] *See supra* note 455.

in the joints that may accommodate shared challenges to broadly applicable detention policies.[459]

Setting those scenarios to the side, and because of the venue limitations attendant to the immediate custodian rule, the more common pattern will be a series of habeas class actions filed in district courts around the country. That pattern ensures opportunities for percolation, as different judges from different places will have to consider questions about both class certification and the legality of any underlying policy. The habeas venue rules also narrow options for forum shopping.[460] Detainees will be unable to pick the most favorable district — or shop for a particular judge by filing in a single-judge division[461] — and obtain nationwide relief. Instead, they must generally sue in the district where the government decides to detain them. Habeas class actions will not, therefore, recreate the problems of universal injunctions.

3. Speed. — One concern about class actions that surfaced in the nationwide injunction debates is that class certification is too cumbersome for effective relief during emergencies or on accelerated timelines.[462] The proponents of class certification must demonstrate to the court that Rule 23's requirements are satisfied — a process that can involve discovery, briefing, and hearings that all consume valuable time.[463] The AEA litigation, moreover, shows just how fast things can move when the government claims some emergency justification to detain large groups. Recall that, to prevent courts from having an opportunity to rule on their habeas claims, the Trump administration tried to remove AEA detainees on less than twenty-four hours' notice,[464] moving them around the country and rushing them onto planes during court proceedings.[465]

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459 *See Padilla*, 542 U.S. at 451–52 (Kennedy, J., concurring) (explaining that the immediate custodian rule is likely a more flexible rule of venue rather than a firmer rule of jurisdiction). Moreover, (1) the immediate custodian rule applies only to "core habeas petitions," *see J.G.G.*, 145 S. Ct. at 1005–06 (quoting *Padilla*, 542 U.S. at 443); and (2) the rule is only a "general" one, *Padilla*, 542 U.S. at 443.

460 *Padilla*, 542 U.S. at 447.

461 *See* Steve Vladeck, *18. The Growing Abuse of Single-Judge Divisions*, ONE FIRST (Mar. 13, 2023), https://www.stevevladeck.com/p/18-shopping-for-judges [https://perma.cc/J2JN-4AYL]; *see also* Paul R. Gugliuzza, *Procedure, Substance, and Judge Shopping*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 27–28), https://ssrn.com/abstract=5212982 [https://perma.cc/EMH7-H2Y5] (reviewing phenomenon).

462 *See, e.g.*, Frost, *supra* note 449, at 1094–97 (suggesting that complexity of class certification made universal injunctions more effective tools for emergency relief); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 58–60 (2017) (explaining that the universal injunction fills this "void" and thus "is worth protecting," *id.* at 59).

463 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (explaining that plaintiffs must affirmatively prove the class meets the requirements of Rule 23); *see also* Speerly v. Gen. Motors, LLC, 143 F.4th 306, 319 (6th Cir. 2025) (rejecting class certification where plaintiffs failed to prove commonality); Parsons v. Ryan, 754 F.3d 657, 664–72 (9th Cir. 2014) (describing extensive discovery and evidence presented in favor of class certification).

464 *See supra* notes 304–305.

465 *See supra* note 78 and accompanying text.

But class actions have an enormous speed advantage over the disaggregated alternative. Despite the procedural formalities of class litigation, courts can swiftly grant interim relief to a "putative" habeas class. In *A.A.R.P.*, the case where the Supreme Court issued a 1:00 a.m. order barring removal from the Northern District of Texas, the Court authorized judges to provisionally treat AEA detainees as a putative class before formal certification.[466] Interim relief for the putative classes, in turn, allows courts to preserve the status quo pending the adjudication. *A.A.R.P.* grounded the Court's authority to form the putative class in the All Writs Act[467] — the very source of authority that courts have relied on to certify habeas class actions.[468] Extending preliminary relief to the putative class was necessary to preserve the courts' jurisdiction to rule both on the propriety of class certification and on the merits of the class's underlying claims.[469] As *A.A.R.P.* demonstrates, the All Writs Act authorizes the court to issue interim class-wide relief swiftly, thereby preserving the status quo while it considers the propriety of habeas class treatment.

CONCLUSION

There is a reason that the architect of Rule 23 considered appropriately certified habeas class actions to be a modern use case.[470] Habeas class treatment ought to be disfavored if the named plaintiff is atypical or inadequately represents the group, or if the class is either too small or lacks common issues. But in habeas cases where detainees challenge a common detention scheme and a single remedy can afford indivisible

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[466] 145 S. Ct. 1364, 1369 (2025) ("And because courts may issue temporary relief to a putative class, we need not decide whether a class should be certified as to the detainees' due process claims in order to temporarily enjoin the Government from removing putative class members while the question of what notice is due is adjudicated." (citing NEWBERG AND RUBENSTEIN, *supra* note 340, § 4:30)). The *A.A.R.P.* holding was hardly a novel development. Courts regularly certify class actions "provisionally" for the purpose of affording preliminary injunctive relief. *See, e.g.*, Roman v. Wolf, 977 F.3d 935, 944 (9th Cir. 2020) (per curiam) ("We further hold that the district court did not err by provisionally certifying a class of all . . . detainees."); O.B. v. Norwood, 170 F. Supp. 3d 1186, 1200 (N.D. Ill. 2016) (noting "general equity powers to order preliminary injunctive relief for the proposed []class of plaintiffs" (alteration in original) (quoting Lee v. Orr, No. 13-cv-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013))), *aff'd*, 838 F.3d 837 (7th Cir. 2016); Mays v. Dart, 453 F. Supp. 3d 1074, 1085 (N.D. Ill. 2020) ("[A] district court has general equity powers allowing it to grant temporary or preliminary injunctive relief to a conditional class." (citing *Lee*, 2013 WL 6490577, at *2)); NEWBERG AND RUBENSTEIN, *supra* note 340, § 4:30 ("At the time" *A.A.R.P.* was decided, "the treatise cited to 19 decisions from seven different circuits in support of this proposition, including two Circuit decisions.").

[467] 145 S. Ct. at 1369 ("We had the power to issue injunctive relief to prevent irreparable harm to the applicants and to preserve our jurisdiction over the matter." (citing 28 U.S.C. § 1651(a))).

[468] *See supra* section II.B.2, pp. 1527–30.

[469] *See A.A.R.P.*, 145 S. Ct. at 1369; *see also* NEWBERG AND RUBENSTEIN, *supra* note 340, § 4:30 ("[T]he Court's holding means that the filing of a class suit ('a putative class'), coupled with a showing that the standard for injunctive relief has been met, is sufficient to enable such relief to the entire putative class.").

[470] *See* Kaplan, *supra* note 273, at 395 & n.151.

relief to the whole class, there is nothing in the Civil Rules, the pertinent statutes, Supreme Court precedent, or lower court practice to suggest that class treatment would be unwise or inappropriate. In fact, and in *CASA*'s wake, habeas class actions might be the only effective way to limit certain kinds of abusive government detention and removal.