

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 24A1007

A. A. R. P., ET AL. *v.* DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.

ON APPLICATION FOR INJUNCTION

[May 16, 2025]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

I cannot join the decision of the Court. First and most important, we lack jurisdiction and therefore have no authority to issue any relief. Second, even if we had such authority, the applicants have not satisfied the requirements for the issuance of injunctive relief pending appellate review. Third, granting certiorari before any decision on the merits has been made by either the District Court or the Court of Appeals is unwarranted.

I
A

“Jurisdiction is power to declare the law,” and “[w]ithout jurisdiction the court cannot proceed at all.” *Ex parte McCordle*, 7 Wall. 506, 514 (1869). So in order for us to do anything in this matter, “we must assure ourselves that we have jurisdiction.” *Abbott v. Perez*, 585 U. S. 579, 594 (2018).

The Court’s theory of jurisdiction, as I understand it, is as follows. Under 28 U. S. C. §1254, we have jurisdiction to review a “case” that is properly before one of the federal courts of appeals. This case was properly before the Court of Appeals for the Fifth Circuit because the two habeas petitioners, A. A. R. P. and W. M. M., took an appeal from a District Court order that refused to issue “an injunction.”

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§1292(a)(1). Although the District Court never actually issued such an order or said that it would do so, the District Court constructively denied injunctive relief by failing to act under circumstances where prompt intervention was urgently needed. See *ante*, at 3.

This theory rests on a mischaracterization of what happened in the District Court. I do not dispute that a district court's failure to act expeditiously may, in some circumstances, have "the practical effect of refusing an injunction" and thus entitle a party to take an interlocutory appeal. *Carson v. American Brands, Inc.*, 450 U. S. 79, 84 (1981); see also §1292(a)(1). But that principle does not apply here where (a) the District Court had no good reason to think that either A. A. R. P. or W. M. M. was in imminent danger of removal, (b) the record at that time contained only sketchy evidence about any imminent threat to members of the class of alien detainees they sought to have certified, (c) the court took the entirely reasonable position that it would wait for the Government to respond to the applicants' request for a temporary restraining order (TRO) before acting, (d) the court set a very short deadline for the filing of the Government's response, and (e) the court was working diligently on the difficult issues presented by the applicants' request for relief for themselves and the members of the putative class.

The Court asserts that the District Court failed to act "for 14 hours and 28 minutes," *ante*, at 3, but that is misleading. Here is what actually happened. On the evening of April 17, lawyers for A. A. R. P. and W. M. M. made a phone call in which they demanded "to talk to the Judge immediately . . . and have the Judge issue an order." Order in No. 1:25-cv-59 (ND Tex., Apr. 21, 2025), ECF Doc. 47-1, p. 2. As the District Court has since correctly noted, judges are generally not permitted to consider such *ex parte* communications. See ECF Doc. 47, at 1-2 (citing Code of Conduct for Federal Judges, Canon 3(A)(4)); see also Fed. Rule Civ.

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Proc. 65(b)(1). So the judge issued an electronic order admonishing the attorneys and stating that “[t]o the extent either party seeks emergency relief, it may file a motion to do so. If an emergency motion is filed, the opposing party shall have 24 hours to file a response.” ECF Doc. 29.

Thus, when the attorneys for A. A. R. P. and W. M. M. filed their renewed motion for a TRO at 12:34 a.m. on April 18, they were fully aware that the District Court intended to give the Government 24 hours to file a response. But in that motion, the attorneys said nothing about a plan to appeal if the District Court elected to wait for that response.

It was not until their 12:48 p.m. emergency motion for an immediate status conference that the attorneys suddenly informed the court that they would file an appeal if the District Court did not act within 42 minutes, *i.e.*, by 1:30 p.m. No. 1:25–cv–59 (ND Tex., Apr. 18, 2025), ECF Doc. 34, p. 2. The attorneys then filed their appeal at 3:02 p.m., just 133 minutes after they put the District Court on notice that they would seek appellate relief. Reply 10. Whether or not the actions taken by applicants’ attorneys are thought to be justified under the circumstances, delivering such an ultimatum to a district court judge (“Act on my motion on a complex matter within 42 or 133 minutes or I’ll file an appeal and divest you of jurisdiction”) represented a very stark departure from what is usually regarded as acceptable practice.

Faced with applicants’ extraordinary demand, the District Court proceeded in an entirely reasonable manner. The Court characterizes the District Court’s behavior during the period in question as “inaction,” *ante*, at 3, but in my judgment, that is unfair. Rather, as the judge has noted, he “was working with utmost diligence to resolve [the] important and complicated issues [presented by the motion] as quickly as possible.” ECF Doc. 41, p. 4. The judge explained that he had not yet ruled because he could

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not “shirk [his] responsibility to decide . . . complicated issues of law without at least some opportunity to review the pleadings and attachments and to get thoughtful responses from the parties.” *Id.*, at 5. And the judge “was prepared to issue an order” “as soon as practicable after the government filed its response shortly after midnight, if not sooner.” *Id.*, at 4.

We should commend this careful approach, not criticize it. In the past few months alone, we have vacated or stayed district court orders that granted temporary injunctive relief without adequate consideration of the relevant issues. See *Trump v. J. G. G.*, 604 U. S. ____ (2025) (*per curiam*); *Department of Education v. California*, 604 U. S. ____ (2025) (*per curiam*). But in this case, a District Court judge is deemed to have constructively denied an injunction by failing to act within the space of a little over two hours on an application that required consideration of important and difficult questions and that was supported by factual submissions that, as I will explain below, were very weak.

Under these circumstances, I cannot agree that the District Court’s failure to act amounted to a constructive denial of the applicants’ request for relief.

B

As I mentioned, the factual support provided to the District Court was weak. The Court claims that the facts presented to the District Court on April 18 showed that there was an emergency entailing a high risk of “serious, perhaps irreparable, consequences.” *Ante*, at 3 (internal quotation marks omitted). But it is important not to conflate the information that was in the record on April 18 with the new information that was presented to this Court several days later.

The record that was before the District Court on April 18 (which is the same record that was before us at midnight on that date) included no concrete evidence that any removals

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were so imminent that a ruling had to be made immediately. The applicants’ factual support consisted of six sworn declarations and a photograph that the applicants asserted was an image of a notice of removal. See App. to Application 32–37, 56–65. But neither the declarations nor the photograph showed “extreme urgency.” *Ante*, at 3.

The declarations certainly did not show that action was urgently needed to protect A. A. R. P. or W. M. M. The Government had represented in District Court that it would not remove either of those men—the only parties who were indisputably before the court—while their habeas petitions were pending. Order in No. 1:25–cv–59 (ND Tex., Apr. 17, 2025), ECF Doc. 27, p. 1. And the two declarations concerning those individuals included no allegations about imminent removal. App. to Application 32–37. Indeed, the declarations concerning them were signed on April 15, prior to the Government’s representation that they would not be removed while their habeas petitions were pending. As a result, the declarations were outdated and provided no support for the claim that either A. A. R. P. or W. M. M. was threatened with removal on April 18 or 19.¹

The remaining evidence in the record at that time concerned only the unnamed members of the as-yet uncertified

¹The Government “unequivocally” told the District Court that it did not “‘presently expect to remove A.A.R.P. or W.M.M. under the [Alien Enemies Act (AEA)] until after the pending habeas petition is resolved,’” and that it would “‘update’” the District Court if that changed. ECF Doc. 27, at 1. And in their application for relief before this Court, the applicants did not assert that A. A. R. P. or W. M. M. in particular were at risk of being removed. To the contrary, the applicants represented that they had contacted the Government and were told that “the two named Applicants had not been given [removal] notices.” Application 5, n. 3. The Government later confirmed in its filings before this Court that it “has agreed not to remove pursuant [to] the AEA those AEA detainees who do file habeas claims,” including the named applicants. Opposition to Emergency Application 2.

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class. And of the four declarations concerning those individuals, only *one* said anything about when removal might happen. In that declaration, a lawyer swore that she spoke on the phone with an unidentified Venezuelan man who said that “ICE had informed them that they will be deported either today or tomorrow to Venezuela.” *Id.*, at 56. In other words, the most specific piece of evidence in the record was a double-hearsay statement that cannot be traced back to any specific government official. Outside of that, *none* of the remaining declarations said anything about imminent removal. They merely stated that certain aliens were receiving deportation notices, but it was not claimed that these notices specified when removal might occur. See *id.*, at 57–58 (Brané decl.); *id.*, at 59–60 (Collins decl.); *id.*, at 61 (Siegel decl.). And the image of a document labeled “Notice and Warrant of Apprehension and Removal Under the Alien Enemies Act,” which the applicants termed a removal notice, likewise said nothing about the time of removal. See *id.*, at 64–65. Other than these declarations, the court was left with unsupported attorney assertions in the application itself.

Ignoring these deficiencies in the record before the District Court, the Court relies on information that was not in the District Court record, namely, (a) statements made by a Government attorney in a hearing in another case that was held in Washington, D. C., during the evening on April 18, well after applicants filed their appeal and (b) evidence that we received several days later. See *ante*, at 2. But in evaluating whether the District Court effectively refused to issue injunctive relief, we must consider the facts as they were known to that court at the time in question.²

²Moreover, it appears to me that the Court overstates what the Government attorney actually said during the April 18 hearing. The attorney represented that it was “definitive” that “there are no flights tonight,” and that “the people [he] spoke to were not aware of any plans for flights tomorrow.” Tr. of Proceedings in *J. G. G. v. Trump*, ECF Doc. 93,

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For these reasons, I agree with the unanimous Court of Appeals panel that the District Court did not constructively deny an application for an injunction. As the panel stated, there was no reason to doubt the “diligence and ability” of the District Court to act appropriately under the circumstances. Order in No. 25–10534 (CA5, Apr. 18, 2025), ECF Doc. 14–1, p. 2. And his “failure to issue the requested ruling” within the extraordinarily short period specified by the applicants cannot reasonably be viewed as “an effective denial of injunctive relief.” *Id.*, at 4 (Ramirez, J., concurring).

II

Even if the District Court had denied the applicants’ motion, there would be no ground for reversal because the applicants failed to satisfy the requirements for emergency injunctive relief, one of which is a showing of likelihood of success on the merits. *Nken v. Holder*, 556 U. S. 418, 434 (2009). And here, in order to obtain what the application sought (and what the Court now provides)—*i.e.*, relief for the members of the class that applicants asked to have certified—applicants had to show that they were likely to establish that class relief is available in a habeas proceeding and, if such relief is available, that the standard requirements for class certification could likely be met.³

p. 15. Although the attorney also said that the Department of Homeland Security “reserve[d] the right to remove people tomorrow,” he repeated numerous times that no flights were planned for April 19. *Id.*, at 26; see also *id.*, at 9, 15, 29–30. The attorney’s statements showed that there was a possibility of future injury but not that such an injury was certainly impending. *Clapper v. Amnesty Int’l, USA*, 568 U. S. 398, 410 (2013).

³The Court asserts that “courts may issue temporary relief to a putative class” without “decid[ing] whether a class should be certified.” *Ante*, at 7. In support of that proposition, the Court cites to no precedent of this Court. Instead, it cites to a treatise that provides no substantive reasoning in support of the proposition. See *ibid.* (citing 2 W. Rubenstein, Newberg & Rubenstein on Class Actions §4:30 (6th ed. 2022 and Supp. 2024)).

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In my judgment, applicants were not likely to prevail on either of those issues.

A

1

First, it 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. Although habeas proceedings are classified as civil, the Federal Rules of Civil Procedure apply only “to the extent that the practice in [habeas] proceedings . . . previously conformed to the practice in civil actions.” Rule 81(a)(4)(B); see also Rule 1. And in accordance with Rule 81, we have acknowledged that some Federal Rules are inapplicable in habeas.

In *Harris v. Nelson*, 394 U. S. 286 (1969), for example, we held that Rule 33—concerning interrogatories—does not apply in habeas proceedings because it has no analogue in historical habeas practice and is a poor fit in a habeas proceeding. *Id.*, at 292–298. Among other things, we noted that the prevalence of fact-finding in habeas proceedings was a relatively recent development, and that the specific scope of Rule 33 was “ill-suited to the special problems and character of [habeas] proceedings.” *Id.*, at 296.

There are similar reasons to believe that Rule 23, which authorizes class actions, is not applicable in habeas. Neither courts nor commentators have found historical support for the practice. One commentator, writing in 1968, noted that “no case has been found in which anything resembling a class action was used in habeas corpus.” Note, Multiparty Federal Habeas Corpus, 81 Harv. L. Rev. 1482, 1493 (1968).

Even if the Court were correct, its position would not justify its decision to entirely sidestep the issue of certification. A court considering whether to issue preliminary injunctive relief must consider whether the movant is likely to succeed on the merits. And to consider whether a request for classwide relief is likely to succeed on the merits, a court must at least consider whether class certification is likely.

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Two years later, another commentator observed that “[c]lass actions for habeas corpus relief have rarely been attempted, perhaps because Rule 81(a)(2) [now Rule 81(a)(4)] seems to bar the application of the civil class action rule to habeas proceedings.” *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1170 (1970) (footnotes omitted). Indeed, there appears to be some historical debate over whether even *joinder* was permitted in habeas practice. Compare Note, 81 Harv. L. Rev., at 1494 (“The issue of joinder was not explicitly ruled upon in any of these cases, and no case has been found which expressly sanctions the procedure”), with *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev., at 1169 (arguing that “the rules on joinder and consolidation apply under even the most restrictive interpretation of Rule 81,” but citing contrary dicta found in at least one case (footnotes omitted)).

2

Despite this lack of historical support, some lower courts have held that our decision in *Harris* sometimes permits procedures that resemble those used in a class action. As noted, *Harris* held that Rule 33, which concerns interrogatories, does not apply in habeas, but the Court also observed that habeas courts “may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage,” when such modes of procedure are necessary to “the habeas corpus jurisdiction and the duty to exercise it.” 394 U. S., at 299. On this ground, *Harris* held that a habeas court may use its authority under the All Writs Act, 28 U. S. C. §1651, to fashion a procedure resembling an interrogatory to the extent that such an instrument is “needed” by the court to “perform [its] duty” to “summarily hear and determine the facts, and dispose of the matter as law and justice require.” 394 U. S., at 299–300 (internal quotation marks omitted).

Based on this discussion in *Harris*, the Second Circuit

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held that while Federal Rule of Civil Procedure 23 does not itself apply in habeas, “a multi-party proceeding similar to” a Rule 23 class action is sometimes allowed. *United States ex rel. Sero v. Preiser*, 506 F. 2d 1115, 1125 (CA2 1974). And it concluded that this procedure was appropriate in “the unusual circumstances” present in the case at hand. *Ibid.*; see also *Bijeol v. Benson*, 513 F. 2d 965, 968 (CA7 1975).

This reading of *Harris* is highly questionable. 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. *Harris* concluded that something like an interrogatory was allowed because it was needed under the circumstances to help the habeas court carry out a duty clearly imposed by law, that is, to “determine the facts” that are material to the claim made by the petitioner who was before the court. 394 U. S., at 299 (quoting 28 U. S. C. §2243).

The situation here is different. No provision of law imposes on a habeas court the duty to determine facts or decide legal issues regarding parties who are not before the court. And as a general matter, the class action device is uniquely “ill-suited” for habeas proceedings, *id.*, at 296, which often turn on individualized and fact-specific determinations regarding the confinement of a specific prisoner.

B

Even if something resembling a class action could be used in a habeas proceeding, it is very questionable whether the requirements for class certification could be met in this case. Rule 23(a)(3) provides that named plaintiffs may sue as representatives of a class “only if,” among other things, “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” And when a court certifies a class, the court is supposed to define the precise “claims” that will be adjudicated on a class-wide basis. See Rule 23(c)(1)(B). That ensures that the only claims

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that are adjudicated in a class action are those that the class brings in common and those for which the named plaintiffs are “typical” representatives of the class. See *General Telephone Co. of Northwest v. EEOC*, 446 U. S. 318, 330 (1980) (“The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff’s claims”).

Here, however, the main interim relief sought on behalf of the putative class—adequate notice of plans for removal under the AEA and an opportunity to contest such removal in court, see Application 17–18; Reply 5–7—is not needed by either A. A. R. P. or W. M. M., who already have a pending habeas proceeding and a promise that they will not be removed until that proceeding concludes. For this reason, their situation differs critically from that of many of the putative class members since they have no personal stake in how the court resolves the question of interim relief for the putative class members.

The Court responds to this problem by suggesting that a class action defendant may not “defeat class treatment, *if it is otherwise proper*, by promising as a matter of grace to treat named plaintiffs differently.” *Ante*, at 7 (emphasis added). But the Court provides no analysis suggesting that class certification here is “otherwise proper,” and instead asserts that it can ignore the question of class certification at this preliminary stage. *Ibid.* And, in any event, the record does not suggest that the Government is treating the named plaintiffs differently “as a matter of grace.” *Ibid.* Rather, it is doing so pursuant to its general policy against removing AEA detainees when they have a pending habeas petition. See Opposition to Emergency Application 2 (“the government has agreed not to remove pursuant [to] the AEA those AEA detainees who do file habeas claims”).

C

We have told district courts that they may certify a class

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only after conducting a “‘rigorous analysis’” of the question. *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338, 351 (2011) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U. S. 147, 161 (1982)). On April 18, the District Court had no time to engage in such analysis, and as a result, it cannot be said that the court abused its discretion in failing to conclude that applicants’ were likely to prevail on their class-action arguments. Cf. *University of Tex. v. Camenisch*, 451 U. S. 390, 393–394 (1981).

The District Court has since had time to conduct the “‘rigorous analysis’” that our precedents require, and has concluded that class certification would be improper here. Order in No. 1:25-cv-59 (ND Tex., May 9, 2025), ECF Doc. 67. That development makes the relief issued by the Court today all the more extraordinary. Purporting to exercise its appellate jurisdiction, the Court issues “preliminary relief” to a putative class that the District Court has explicitly refused to certify, and it does so without providing any substantive analysis suggesting that the District Court’s analysis of the class certification issue was incorrect.

Instead of substantively engaging with the District Court’s order, the Court asserts that the order makes no difference because it “primarily addressed the detainees’ ability to challenge the validity of AEA removal on a class-wide basis,” whereas “[t]he application before this Court seeks only to vindicate notice rights.” *Ante*, at 6, n. *. But the District Court’s order did address the notice question. In addition to explaining why the applicants cannot pursue their final merits claims as a class action, the order explains at length why the applicants’ claims regarding notice rights also cannot proceed on a class basis. ECF Doc. 67, at 29–31, 33, 38–39. Among other things, the District Court observed that “due process is by its very nature individualized,” *id.*, at 33, a proposition plainly supported by our precedents. See *Jennings v. Rodriguez*, 583 U. S. 281, 314

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(2018) (“Due process is flexible, we have stressed repeatedly, and it calls for such procedural protections as the particular situation demands” (internal quotation marks and alteration omitted)).

In any event, the District Court also offered several general reasons why class relief would be inappropriate here, and these apply equally to the applicants’ claims regarding notice rights. See ECF Doc. 67, at 35–36, 39–45. The Court today issues temporary relief without engaging with *any* of that analysis. And, what’s more, it asks the Fifth Circuit to finally adjudicate the notice rights of members of the putative class without asking that court to do its own analysis regarding whether class certification as to those claims would be appropriate. *Ante*, at 8. Clearly, the Court would prefer to ignore the important step of class certification and skip directly to the adjudication of the class members’ rights. The Federal Rules do not permit such a shortcut.

III

Instead of merely ruling on the application that is before us—which asks for emergency relief pending appeal—the Court takes the unusual step of granting certiorari before judgment, summarily vacating the judgment below dismissing the applicants’ appeal, and remanding the case to the Court of Appeals with directions regarding the issues that court should address. From the Court’s order, it is not entirely clear whether the Court has silently decided issues that go beyond the question of interim relief. (I certainly hope that it has not.) But if it has done so, today’s order is doubly extraordinary. Granting certiorari before a court of appeals has entered a judgment is a sharp departure from usual practice, but here neither the Court of Appeals nor the District Court has decided any merits questions.

We have said more times than I care to remember that “we are a court of review, not first view.” *Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). Even on the Court’s

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reading of what happened below, all that the District Court and the Court of Appeals decided was that the applicants were not entitled to temporary injunctive relief. If the Court has gone beyond that question, it has blazed a new trail. It has plucked a case from a district court and decided important issues in the first instance. To my eyes, that looks far too much like an expansion of our original jurisdiction.

I must therefore respectfully dissent.