No. 20-1828

In the United States Court of Appeals
for the Fourth Circuit

MARVIN DUBON MIRANDA, ET AL.

Petitioners-Appellees,

v.

MERRICK B. GARLAND, ET AL.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
DISTRICT COURT NO. 20-CV-01110-CCB

PETITIONERS-APPELLEES' PETITION FOR REHEARING EN BANC

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 35, Petitioners-Appellees petition this Court for rehearing *en banc*.

The question before the panel was simple: must the government comply with fundamental due process when detaining noncitizens pursuant to its discretionary authority under 8 U.S.C. § 1226(a)? Until the split panel decision, every circuit court and the overwhelming majority of district courts addressing this question had concluded that the government must justify detention under § 1226(a) on the basis of flight risk or dangerousness and, when applicable, adopt procedures to avoid detention on the basis of wealth. Yet the panel majority reached the opposite conclusion, holding that noncitizens—by virtue of their *status as noncitizens alone*—can be detained without justification. Op. 28-44.

The outlier decision creates a lopsided circuit split, conflicts with Supreme Court precedent, undermines noncitizens' constitutional rights, and warps procedural due process. The decision squarely conflicts with two circuits' holdings on the procedures due at initial § 1226(a) bond hearings, *see Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021); *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021); *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), and the reasoning of three circuits' decisions on the procedures due in other immigration bond proceedings, *see Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020); *German Santos v. Warden*

Pike Cnty. Corr. Facility, 965 F.3d 203 (3d Cir. 2020); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). It also conflicts with Supreme Court and Circuit precedent requiring fundamental due process for civil detention and concerning the proper analysis of procedural due process claims. *See Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Addington v. Texas*, 441 U.S. 418 (1979); *United States v. Comstock*, 627 F.3d 513, 524-25 (4th Cir. 2010).

Finally, the majority wrongly concluded that 8 U.S.C. § 1252(f)(1) stripped the district court of subject-matter jurisdiction to enter a class-wide preliminary injunction. That holding directly conflicts with the Supreme Court's recent ruling that § 1252(f)(1) limits courts' *remedial authority*, and not their subject-matter jurisdiction. *See Biden v. Texas*, No. 21-954, 2022 WL 2347211, at *7-9 (U.S. June 30, 2022). Moreover, because the Supreme Court has held that § 1252(f)(1) is not jurisdictional, and because the government failed to raise § 1252(f)(1) in opposition to the injunction below, the government has forfeited any such challenge on appeal. Thus, should this Court grant rehearing and reverse the majority's due process holding, it should affirm the class-wide preliminary injunction. Furthermore, § 1252(f)(1) imposes no limit on declaratory relief. Thus, should this Court grant rehearing and reverse on the merits, it should also remand for the district court to consider the propriety of class-wide declaratory relief.

If left in place, the majority's decision will deny noncitizens due process against arbitrary imprisonment and undermine procedural due process claims in general. Petitioners-Appellees' petition for rehearing *en banc* should be granted.

ARGUMENT

I. The Majority's Due Process Ruling Conflicts with Four Courts of Appeals and the Supreme Court's Civil Detention Precedents.

The majority stands alone against the decisions of four other circuits. As the majority acknowledged, Op. 43-44, the First Circuit has held that due process requires the government to bear the burden of proof at initial § 1226(a) bond hearings and prove dangerousness by clear and convincing evidence. *Brito*, 22 F.4th at 246; *Hernandez-Lara*, 10 F.4th at 35, 40.[1] And the Ninth Circuit has held that, where noncitizens are found eligible for release, due process requires the immigration court to consider their ability to pay bond and alternatives to bond to prevent detention based solely on a lack of financial resources. *Hernandez*, 872 F.3d at 990-94. Nearly every district court to have addressed these issues has reached the same conclusions. *See* Pet'rs-Appellees' Br. at 17, 29 (citing cases); *see also*, *e.g.*, *Hulke v. Schmidt*, No. 21-CV-845-JPS, 2021 WL 5416002, ---F. Supp. 3d---, at *7 (E.D. Wis. Nov. 19, 2021) (joining the "growing chorus" of courts).[2]

[1] *Hernandez-Lara* required that the government establish flight risk by a preponderance of the evidence. 10 F.4th at 40.

[2] The majority purports to join the Third Circuit, Op. 44, but *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274 (3d Cir. 2018), is inapposite. Borbot did

The majority failed even to recognize its conflict with the reasoning of the Second, Third, and Ninth Circuits' decisions addressing the due process requirements for prolonged detention of noncitizens under § 1226(a) and 8 U.S.C. § 1226(c). These circuits have held that, where due process requires a bond hearing following prolonged detention, the government must comply with due process and justify any further detention by proving flight risk or dangerousness. That is, it is not enough to provide a bond hearing; that bond hearing must comport with due process, and that means requiring the government to bear the burden of proof. These circuits have also rejected the notion—adopted by the majority, *see* Op. 30-32—that *Demore v. Kim*, 538 U.S. 510 (2003), blessed the categorical detention of all noncitizens without due process protections. *See Velasco Lopez*, 978 F.3d at 851-57; *German Santos*, 965 F.3d at 208-10, 213-14; *Singh*, 638 F.3d at 1203-06; *Rodriguez v. Robbins*, 804 F.3d 1060, 1087 (9th Cir. 2015), *rev'd on other grounds, Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (distinguishing *Demore*).

The decision also breaks with longstanding Supreme Court precedent. For a civil detention scheme to satisfy due process, the Supreme Court has required that

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not challenge the procedures at his initial bond hearing, arguing instead that the length of his detention *alone* required a new hearing. *See id.* at 276; Pet'rs-Appellees' Br. at 22-23. The Third Circuit has more recently held that where a noncitizen detained under 8 U.S.C. § 1226(c) is entitled to a bond hearing, the government must bear the burden of justifying continued detention by clear and convincing evidence. *See German Santos*, 965 F.3d at 213-14.

the government bear the burden of justifying detention, and consistently struck down detention-by-default schemes that placed the burden on the individual to prove they should not be imprisoned. *See Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (finding custody review procedures deficient because, *inter alia*, they placed the burden on the detainee); *Foucha*, 504 U.S. at 81-83 (invalidating civil commitment scheme because, *inter alia*, it "place[d] the burden on the detainee to prove that he [wa]s not dangerous"). This is because "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755.

Moreover, because "[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas*, 533 U.S. at 690, the government must meet a heightened burden of proof: clear and convincing evidence. *See Addington*, 441 U.S. at 432-33. A deprivation of "particularly important individual interests" requires nothing less. *Id.* at 424; *see also Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (requiring "clear, unequivocal, and convincing" evidence in deportation cases); *Chaunt v. United States*, 364 U.S. 350, 353-55 (1960) (same, for denaturalization); *Comstock*, 627 F.3d at 524-25 (upholding civil commitment statute). Individuals must not "share equally with society the risk of error when the possible injury to the individual"—deprivation of liberty—is so grave. *Addington*, 441 U.S. at 427.

Finally, the Supreme Court has long recognized that incarceration without consideration of ability to pay a bond and alternatives to imprisonment impermissibly risks "imprisoning a defendant solely because of his lack of financial resources," in violation of due process. *Bearden v. Georgia*, 461 U.S. 660, 661-62, 672-73 (1983). Circuit courts have applied *Bearden*'s logic to require such consideration for pretrial criminal bail and immigration detention. *See O'Donnell v. Harris Cnty.*, 892 F.3d 147, 163-64 (5th Cir. 2018), *overruled on other grounds by Daves v. Dallas County*, 22 F.4th 522 (5th Cir. 2022) (bail); *Hernandez*, 872 F.3d at 992 (immigration detention); *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (bail).

The majority abandoned these precedents and reached a decision that conflicts with four other circuits. This alone warrants *en banc* review.

II. The Majority's *Mathews* Analysis Conflicts with Supreme Court Precedent and the Decisions of Other Circuit Courts and Undermines Procedural Due Process.

En banc review is also warranted to correct the majority's flawed application of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The majority erred at each step of the analysis, misunderstanding Supreme Court precedent, breaking with other circuits, and adopting novel and unsupported reasoning that undermines procedural due process claims.

Liberty Interest: The majority remarkably concluded that noncitizens are generally "due less process when facing removal hearings than an ordinary citizen would have." Op. 33. This was based on two fundamental errors.

First, the majority deemed Supreme Court precedent governing civil detention inapplicable to noncitizens because those cases "involved detention of United States citizens." Op. 29 (citing *Addington*). But nothing in *Addington* or related precedent suggests that individuals' status as citizens was determinative of the due process analysis. In fact, citizenship is not even mentioned or discussed in those decisions. The cases concerned the due process rights of *anyone*, citizens and noncitizens alike, subjected to civil detention. *See, e.g.*, *Addington*, 441 U.S. at 425, 427 (discussing the due process rights of "individuals"). And the Supreme Court has made clear that, by "appl[ying] to all '*persons*' within the United States," the Due Process Clause necessarily "include[es] aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693 (emphasis added) (quoting U.S. Const., amend. V); *accord* Op. 52-53, 62 (Urbanski, J., dissenting in part).

The majority also ignored that the Supreme Court *already* has applied its civil detention precedents to immigration detention. In *Zadvydas*, the Court explicitly cited *Salerno*, *Foucha*, and *Hendricks* to determine due process limits on noncitizen detention, 533 U.S. at 690-92; *accord Hernandez-Lara*, 10 F.4th at 37-38; *see also*

Velasco-Lopez, 978 F.3d at 856, and emphasized that the immigration "power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. The majority nowhere acknowledged this holding.

Second, the majority concluded that *Demore* blessed categorical detention of noncitizens without justification in *all* contexts. Op. 30-32. Not so. As Judge Urbanski explained, Op. 58-59 (Urbanski, J., dissenting in part), and as every other circuit court addressing the issue has held, *see supra*, *Demore* concerned *only* the mandatory detention scheme adopted by Congress in § 1226(c) for a class of so-called "criminal aliens" charged with removal for enumerated crimes. *Demore* concluded that, because the average length of those noncitizens' detention was at most five months, and Congress had before it an extensive factual record concerning this class of noncitizens' flight risk and dangerousness, the categorical detention mandate did not offend due process. 538 U.S. at 513, 517-19, 528-30.

Neither reasoning applies to this case, and as such, *Demore* has no application to detention under § 1226(a). Op. 59 (Urbanski, J., dissenting in part). To start, the majority was wrong that § 1226(a) detentions are always "for a specified period of time" and not indefinite. *Compare* Op. 33 *with Hernandez-Lara*, 10 F.4th at 30 (noting that one in four § 1226(a) detainees "was incarcerated for two years or longer"); JA67. "Detention under § 1226(a) is frequently prolonged because it

continues until all proceedings and appeals are concluded." *Velasco Lopez*, 978 F.3d at 852.[3]

More important, the majority ignored *Demore*'s critical distinction: § 1226(c) is a congressionally-authorized detention scheme supported by substantial evidence of the bail risk posed by "criminal aliens." In contrast, Congress made *no* such findings regarding the "wide swath of noncitizens [falling under § 1226(a)], many of whom . . . have no criminal record at all," *Hernandez-Lara*, 10 F.4th at 36, and did *not* mandate their categorical detention. In fact, Congress *preserved* language in § 1226(a) that had been interpreted for decades as requiring *the government* to show, on an individualized basis, that detention was justified on the basis of flight risk or dangerousness. *See id*. at 26-27; *see also id.* at 35-36 (distinguishing *Demore*); *Velasco Lopez*, 978 F.3d at 848, 854 (same).

The majority also wrongly concluded that *Demore* undermined the significance of *Zadvydas* to this case. *See* Op. 30-33. *Demore* distinguished *Zadvydas* because, unlike the detentions in *Zadvydas*, detention under § 1226(c) was "pending . . . removal proceedings," of a "shorter duration" (averaging at most five months), and authorized only with substantial evidence of "criminal aliens[']" bail

[3] Indeed, even *Demore*'s statistics purporting to show that mandatory detention was brief later proved to be incorrect. *See Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting) (explaining that the average detention length in appealed cases was nearly a year).

risk. 538 U.S. at 527-31. But although detention under § 1226(a) is pending removal proceedings, none of the other *Demore* distinctions are applicable. *Zadvydas*, therefore, remains an important precedent concerning the due process rights of the noncitizens in this case.

Risk of Error: The majority wrongly concluded that Petitioners "fail[ed] to show how the current procedures result in erroneous deprivations of liberty or how the procedures [Petitioners propose] will reduce erroneous detention decisions." Op. 34. All four of the majority's reasons are misguided.[4]

First, the majority disregarded Petitioners' "complaints" regarding the current bond procedures—including lack of appointed counsel, advanced notice of the evidence, and translation—as "separate procedural complaints" from the claims Petitioners advanced. *Id*. In doing so, the majority contrived a novel interpretation of the *Mathews* inquiry—in conflict with Supreme Court precedent—that requires a court to look at each procedure in isolation to determine if it, alone, deprived a litigant of due process. That is not the test. *Mathews* requires the court to look at the *whole* system and determine the risk of error "through the procedures used." 424 U.S. at 335. That is, courts must examine whether "a set of [available procedures], . . . *if employed together*, can significantly reduce the risk of an erroneous

[4] The majority faulted the district court for purportedly failing to analyze this factor. Op. 33. But the district court considered and cited evidence concerning the risk of error. *Dubon-Miranda v. Barr*, 463 F. Supp. 3d 632, 646 (D. Md. 2020).

deprivation of liberty." *Turner v. Rogers*, 564 U.S. 431, 447 (2011) (emphasis added); *see also United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (finding unacceptable risk of error by considering applicable standard, consideration of evidence, *ex parte* nature of proceedings, and inadequacy of subsequent hearing); *Kirk v. Comm'r of Soc. Sec. Admin.*, 987 F.3d 314, 325-26 (4th Cir. 2021) (same, due to lack of notice and opportunity to rebut agency decision, exclusion of certain evidence, and obstacles to obtaining permitted evidence); *Hernandez-Lara*, 10 F.4th at 30-31 (analyzing burden of proof in light of no right to appointed counsel, obstacles to gathering evidence, government's superior knowledge of immigration law, and difficulty of proving that one is *not* a bail risk); *Velasco-Lopez*, 978 F.3d at 852 (finding the whole of "the procedures . . . markedly increased the risk of error"). If its unsupported application of *Mathews* stands, the majority decision could undermine *all* due process claims in this Circuit.[5]

Second, the majority held, without any support, that "aliens should know as much or more than the government about their own criminal history." Op. 34. That is contrary to the holdings of other circuits to have addressed this question[6] and the

[5] Indeed, the majority's reasoning invites government defendants in due process cases—including outside the immigration context—to argue that courts should disaggregate its analysis of the challenged procedures, thus significantly tilting the odds in defendants' favor.

[6] *E.g.*, *Hernandez-Lara*, 10 F.4th at 30, 40 ("[T]he government has ample and better access to evidence of dangerousness."); *Velasco Lopez*, 978 F.3d at 853 (noting the government's "computerized access to numerous databases and to information

clear record evidence, *see, e.g.*, JA71-72, 80-81, 95-97; ECF 41-1 at 2-4. And although noncitizens might have equal or more access to information bearing on flight risk (such as family ties and employment history), the majority ignored that putting the burden on the noncitizen would require her to prove a negative, "which can often be more difficult than proving a cause for concern," *Hernandez-Lara*, 10 F.4th at 31; *see also* Op. 64 (Urbanski, J., dissenting in part). The difficulty, if not impossibility, of proving a negative readily supports the district court's conclusion that placing the burden on the noncitizen increases the risk of erroneous deprivation.

Third, the majority held that because noncitizens receive notice and an opportunity to be heard, including "three separate opportunities to make their case concerning bond," due process is satisfied. Op. 35. "But because the burden is always on the noncitizen, the availability of review does little to change the risk of error inherent in the current burden allocation. Loaded dice rolled three times are still loaded dice." *Hernandez-Lara*, 10 F.4th at 32.

Fourth, again invoking *Demore*, the majority believed that requiring consideration of individualized risk of flight and danger conflicted with Supreme Court precedent because "procedures that presume detention categorically do not offend the Constitution." Op. 36-37. This misunderstands precedent. As explained

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collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities").

supra, *Demore* approved the § 1226(c) mandatory detention scheme, for brief periods, *only because* Congress considered substantial evidence concerning the bail risk of a class of "criminal aliens."[7]

The majority also relied on provisions of the Bail Reform Act, 18 U.S.C. § 3142(e)(2)-(3), which appear to authorize detention even when the government does not bear the burden of proof in every case. Op. 37-38. Importantly, the Supreme Court in *Salerno* blessed the constitutionality of § 3142(e) only on the understanding that the government was required to justify detention based on danger "by clear and convincing evidence after an adversary hearing." 481 U.S. at 741. In any event, those limited provisions shifting the burden in cases concerning particularly grave offenses constitute a congressionally-authorized and narrow departure from traditional due process, akin to the narrow departure authorized under the § 1226(c) mandatory detention scheme in *Demore*. That is not the case for § 1226(a).

With respect to consideration of noncitizens' ability to pay and alternatives to bond, the majority erroneously held that Petitioners presented no evidence of

[7] *Carlson v. Landon*, 342 U.S. 524 (1952), is similarly distinguishable. Congress determined, based on an evidentiary record, that a class of "active alien communists" were especially dangerous to the United States and permitted the Attorney General to deny bail based on their active Communist affiliations. *Id.* at 526-27, 535-36, 543-44. *Reno v. Flores* concerned the rights of minors whom the Court deemed were "always in some form of custody," 507 U.S. 292, 302-03 (1993), and who were in fact entitled to bond hearings where the government bore the burden of proof, *see id.* at 307-09. *See also* Pet'rs-Appellees' Br. 18-19.

incorrect deprivations of liberty. Op. 38-39. In fact, Petitioners Adegoke and Espinoza were granted release on bond, but remained detained *solely due to their inability to pay*. *See* JA178-79, 190-91. And the risk of error is evident and supported by precedent: failure to consider these factors is *guaranteed* to result in wealth-based detention. As the Ninth Circuit has explained:

> Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters.

Hernandez, 872 F.3d at 991.

Governmental Interest: Finally, the majority focused solely on the governmental interest in detaining noncitizens pending removal proceedings and faulted the district court for purportedly failing to consider it. Op. 40. But the court below *did* consider this interest; it simply concluded that such detention had to comport with due process. 463 F. Supp. 3d at 645. As the Second Circuit has recognized, the government has *no* interest in detention that serves no legitimate purpose or in "separat[ing] families and remov[ing] from the community breadwinners, caregivers, parents, siblings and employees" through unconstitutional hearing procedures. *Velasco Lopez*, 978 F.3d at 855. Similarly, "the government has no legitimate interest in detaining individuals . . . whose appearance at future immigration proceedings can be reasonably ensured by a lesser bond or alternative

conditions." *Hernandez*, 872 F.3d at 994. Indeed, the *majority* ignored the true scope of the governmental interest in this case, misconstruing it as detention at all costs while disregarding the interest in permitting noncitizens who pose no flight risk or danger to return to their communities.[8]

III. The Majority's Interpretation of Section 1252(f)(1) Warrants Rehearing.

Finally, the majority wrongly concluded that 8 U.S.C. § 1252(f)(1) stripped the district court of subject-matter jurisdiction to grant class-wide injunctive relief. *See* Op. 19-23. That holding directly conflicts with the Supreme Court's recent holding in *Biden v. Texas* that § 1252(f)(1) is a limit on courts' *remedial authority*, and not their subject-matter jurisdiction. *Biden,* 2022 WL 2347211, at *7-9.

Section 1252(f)(1) limits courts' "jurisdiction or authority to enjoin or restrain the operation of" the immigration detention statutes to cases involving "an individual alien"—thus barring the entry of such class-wide injunctive relief. 8 U.S.C. § 1252(f)(1).[9] As the Supreme Court explained, the plain language of the provision

[8] The majority also wrongly concluded that the remaining injunction factors did not support relief. *See* Op. 41-42. Its irreparable harm analysis hinged entirely on its erroneous analysis of the merits. *Id.* And its analysis of the equities and public interest considered only the government's interest in detention and deportation, *id.*, and not the public interest in "upholding constitutional rights," *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520 (4th Cir. 2002).

[9] *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2022 WL 2111346, at *4 (2022) (explaining that § 1252(f)(1) "generally prohibits . . . injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" the detention statutes).

"deprives courts of the power to issue a specific category of remedies." *Biden*, 2022 WL 2347211, at *8. It does not, "by contrast, restrict[] a court's power to adjudicate a case." *Id*. (cleaned up). This plain reading is reinforced by, among other things, the provision's title (i.e., "[l]imit on injunctive relief"); the "statutory structure," which shows that where Congress chose to eliminate subject-matter jurisdiction in § 1252, it did so using far more explicit language, *id*. (citing 8 U.S.C. §§ 1252(a)(2), (g)); and the Court's prior decision in *Nielsen v. Preap*, 139 S. Ct. 954 (2019). *Biden*, 2022 WL 2347211, at *8. "In short, [the Court saw] no basis for the conclusion that Section 1252(f)(1) concerns subject matter jurisdiction." *Id*. at *9.

Furthermore, because the Supreme Court has held that § 1252(f)(1) is not jurisdictional, and because here the government failed to oppose the injunction based on § 1252(f)(1) below, the government has forfeited any such challenge on appeal. Pet'rs-Appellees' Br. 40-44. Forfeiture is a defining feature of nonjurisdictional rules, *see, e.g*., *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 18 (2017), and applies to untimely objections to injunctive relief, *see Atlas Life Ins. Co. v. W.I. Southern, Inc*., 306 U.S. 563, 568 n.1 (1939) (noting that unlike subject-matter jurisdiction, "the parties may waive their objections to . . . equity jurisdiction . . . by failure to take it seasonably" (citations omitted)); *accord Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1159 (D.C. Cir. 2007) (citing cases). Thus, should this Court grant

rehearing and reverse the majority's due process holding, it should affirm the class-wide injunction entered below.

In addition, § 1252(f)(1) imposes no limit on declaratory relief. *See* Op. 71-73 (Urbanski, J., dissenting in part). Thus, should this Court grant rehearing and reverse on the merits, it should also remand to the district court for the consideration of class-wide declaratory relief.

Although the Supreme Court declined to address declaratory relief in its recent decisions on § 1252(f)(1),[10] the plain language of the statute makes clear that declaratory relief remains available. Section 1252(f)(1) limits only orders that would "enjoin or restrain the operation of" the immigration detention statutes. These are legal terms of art that track the traditional forms of injunctive relief—injunctions and temporary restraining orders rather than declaratory relief.[11] That the provision does not mention "declaratory relief" at all is meaningful. Declaratory relief is a distinct form of relief made available by Congress separately in the Declaratory Relief Act, 28 U.S.C. § 2201, and which the Supreme Court has recognized "is not

[10] *See Aleman Gonzalez*, 2022 WL 2111346 at *5 n.2; *Biden*, 2022 WL 2347211, at *9 n.4. The Court also declined in *Biden* to address whether § 1252(f)(1) is subject to forfeiture. 2022 WL 2347211, at *9 n.4.

[11] *See* Hobbs Act, 28 U.S.C. § 2349(a) & (b) (setting out, respectively, the power of the court of appeals to enjoin and temporarily restrain an agency order); Fed. R. Civ. P. 65 (providing for "injunctions and restraining orders"); *see also Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003) ("This distinction between 'enjoin' and 'restrain' mirrors an identical distinction expressly made in the Hobbs Act, 28 U.S.C. § 2349(a) & (b)—a statute that [8 U.S.C. § 1252](a)(1) explicitly incorporates.").

ultimately coercive," *Steffel v. Thompson*, 415 U.S. 452, 471 (1974), and does not "interdict[] the operation of the statute." *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 155 (1963). "Congress plainly *intended* declaratory relief to act as an alternative to the strong medicine of the injunction." *Steffel*, 415 U.S. at 466; *see generally id*. at 466-67, 471 (emphasizing differences between injunctive and declaratory relief). "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co*., 328 U.S. 395, 398 (1946). Section 1252(f)(1) does not, either by its words or by "a necessary and inescapable inference," bar declaratory relief.

Reading § 1252(f)(1) not to bar declaratory relief is also supported by the fact that in a neighboring provision of the very same statute, Congress explicitly precluded declaratory relief for other types of claims. In the contemporaneously enacted § 1252(e),[12] Congress prohibited a court from entering "*declaratory*, injunctive, or other equitable relief" with respect to expedited removal orders. 8 U.S.C. § 1252(e)(1)(A) (emphasis added). Whereas § 1252(e)(1) explicitly prohibits courts from awarding "declaratory, injunctive, or other equitable relief," the adjacent § 1252(f)(1) uses only the terms "enjoin or restrain" but makes no mention of

[12] *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 306, 110 Stat. 3009, 3009–610 to 3009–612 (1996).

declaratory relief. Likewise, § 1252(e)(1) is titled "Limitations on relief," whereas § 1252(f)(1) is narrowly titled "Limit on *Injunctive* Relief." (emphasis added). *See Reno v. American-Arab Anti-Discrimination Comm*., 525 U.S. 471, 481 (1999) ("By its plain terms, and even by its title, [Section 1252(f)] is nothing more or less than a limit on injunctive relief."). "[W]hen 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." *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 452 (2002) (cleaned up). This is "particularly true" where, as here, the "subsections . . . were enacted as part of a unified overhaul of judicial review procedures." *Nken v. Holder*, 556 U.S. 418, 430-31 (2009). Thus, the statutory context confirms the plain reading of § 1252(f)(1) as prohibiting only injunctions and restraining orders, and not declaratory relief.

Indeed, six Justices of the Supreme Court have already concluded that § 1252(f)(1) does not bar declaratory relief. *See Nielsen*, 139 S. Ct. at 962 (opinion of Alito, J., in which Roberts, C.J. and Kavanaugh, J. joined) (§ 1252(f)(1) did not eliminate "jurisdiction to entertain the plaintiffs' request for declaratory relief"); *Jennings*, 138 S. Ct. at 875 (Breyer, J., joined by Ginsburg, J. and Sotomayor, J., dissenting) (a "court could order declaratory relief" regardless of § 1252(f)(1)); *see also Aleman Gonzalez*, 2022 WL 2111346 at *16 n.9 (Sotomayor, J., dissenting in part). And every circuit court to have decided the issue has reached the same

conclusion. *See Brito*, 22 F.4th at 252 ("[W]e conclude that declaratory relief remains available under section 1252(f)(1)."); *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020) ("[§ 1252(f)] does not proscribe issuance of a declaratory judgment[.]"); *Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011) ("[I]t is apparent that the jurisdictional limitations in § 1252(f)(1) do not encompass declaratory relief."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2010) ("Section 1252(f) was not meant to bar classwide declaratory relief."); *but see Hamama v. Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018) (noting that "the issue of declaratory relief is not before us," but that "we are skeptical [the noncitizens] would prevail"). This Court should reach the same conclusion.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 40(b)(1) because it contains 4,900 words.[13] This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

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[13] On June 27, 2022, the Court granted Petitioners-Appellees' unopposed motion to, *inter alia*, extend the word limit for their petition for rehearing en banc from 3,900 words to no more than 4,900 words.

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2022, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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