AGGREGATION AND THE "UNIVERSAL" INJUNCTION

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INTRODUCTION

A crucial function of judicial review is not only "to say what the law is,"[1] but also to provide the remedies to vindicate that law.[2] Judicial review plays an especially important role when government officials act in ways that violate federal law, including when they violate the Constitution.[3] When government officials violate the law, the judicial review function supports a remedy that requires officials to comply with federal law by ceasing to pursue the illegal policy or practice.

Such "compliance" injunctions have been given the label "universal" or "nationwide" injunctions insofar as they go beyond giving "complete relief *to the plaintiffs before the court*."[4] Among other things, this framing couches compliance injunctions as aggregation devices — as improper attempts to "create de facto class actions."[5] Although this characterization has never been entirely accurate,[6] the majority in *Trump v. CASA, Inc.*[7] embraced it and, as a result, narrowly construed the federal courts' statutory authority to issue such injunctions in cases brought by individual plaintiffs.[8] The *CASA* decision makes it imperative to reckon with "universal" injunctions through the lens of aggregation —

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[2] *Id.* at 163 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23)).

[3] *E.g.*, United States v. Lee, 106 U.S. 196, 220–21 (1882).

[4] Trump v. CASA, Inc., 145 S. Ct. 2540, 2548 n.1, 2557 (2025).

[5] *Id.* at 2556 (quoting Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) (emphasis omitted)). Professor Maureen Carroll describes individual plaintiff litigation to obtain compliance injunctions outside of class actions as "quasi-individual" actions. Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2020 (2015).

[6] *See CASA*, 145 S. Ct. at 2600 n.2 (Jackson, J., dissenting) (arguing that "the majority's primary premise — that universal injunctions 'grant relief to nonparties' — is suspect" because "[w]hen a court issues an injunction (universal or otherwise), it does so via an order that governs the relationship between the plaintiff and the defendant").

[7] 145 S. Ct. 2540 (2025).

[8] *See supra* notes 4–5 and *infra* notes 20–22 and accompanying text.

specifically, through the lens of class actions under Rule 23 of the Federal Rules of Civil Procedure.[9]

In this Essay, we begin with a brief summary of the *CASA* decision's holding regarding the availability of "universal" injunctions.[10] Part II discusses the relationship between remedies and judicial review and the important role that such injunctions play in that regard. Part III explores how class actions could serve as an alternative path for federal courts, after engaging in judicial review, to make their decisions meaningful by requiring officials to comply with the law and to cease illegal actions or policies. We also respond to several objections to the use of class actions in this context. The final Part addresses some implications of the class action route to "universal" injunctions, identifying the core functional connection between class actions and such injunctions, but also acknowledging some of the problems that this class action route may pose.

I. *TRUMP V. CASA* AND THE "UNIVERSAL" INJUNCTION

This Part provides a brief description of the *CASA* decision. Although there are grounds to dispute the Court's ultimate decision and premises,[11] we focus on *CASA*'s doctrinal takeaways to identify the threat *CASA* poses to judicial review and to set the table for what follows.

The Supreme Court case captioned *Trump v. CASA* involved three separate federal lawsuits challenging President Trump's Executive

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[9] *See generally, e.g.*, David Marcus, *The Class Action After Trump v. CASA*, 73 UCLA L. REV. DISCOURSE 2 (2025) (discussing the role of class actions after the *CASA* decision). Class actions are not the only vehicle for obtaining compliance injunctions against governmental policies that violate federal law. *See infra* notes 24–29 and accompanying text (discussing how *CASA* did not rule out such relief either (a) in suits by individual, governmental, or associational plaintiffs in certain circumstances, or (b) when authorized by the vacatur provision of the Administrative Procedure Act).

[10] For an explanation of why we put "universal" injunctions in quotation marks, see Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions*," 91 U. COLO. L. REV. 847, 849–50 (2020).

[11] *See, e.g.*, *CASA*, 145 S. Ct. at 2573–96 (Sotomayor, J., dissenting) (opining that *CASA* "kneecaps the Judiciary's authority to stop the Executive from enforcing even the most unconstitutional policies," *id.* at 2582, and that "the issuance of broad equitable relief intended to benefit parties and nonparties has deep roots in equity's history and in this Court's precedents," *id.* at 2584); *id.* at 2596–608 (Jackson, J., dissenting) (noting that *CASA*'s "decision to permit the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law," *id.* at 2596–97); *see also* Jack Goldsmith, *A Legal Mistake at the Heart of Trump v. CASA?*, EXEC. FUNCTIONS (July 11, 2025), https://executivefunctions.substack.com/p/a-legal-mistake-at-the-heart-of-trump [https://perma.cc/5XSV-4BZ3] (arguing that *CASA*'s reliance on "Section 11 of the Judiciary Act of 1789, a diversity jurisdiction provision, as the justification for equitable remedies in a federal question case, makes little sense").

Order No. 14,160,[12] often referred to as the birthright citizenship order.[13] This order stated that it would be "the policy of the United States" to deny citizenship to persons born in the United States when (1) the "mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth," or (2) the "mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth."[14] The district courts in all three cases found that the policy likely violated the Fourteenth Amendment's Citizenship Clause, and each issued "a universal preliminary injunction barring various executive officials from applying the policy to *anyone* in the country."[15]

The Supreme Court's decision in *CASA* did not address the substantive merits of the challenge to the birthright citizenship order.[16] Writing for a 6–3 majority, Justice Barrett ruled only that the Judiciary Act of 1789[17] does not give federal courts authority to issue so-called "universal" injunctions or "nationwide" injunctions — which she defined as injunctions that "prohibit enforcement of a law or policy against *anyone*"[18] — unless doing so is "necessary and appropriate" for the specific plaintiffs in the case.[19] The majority held that "[a] universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power."[20] Rather, the Act authorizes such injunctions insofar as they "will offer complete relief *to the*

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[12] *CASA*, 145 S. Ct. at 2549.

[13] *See, e.g.*, Adam Liptak, *Trump's Birthright Citizenship Order Draws Lines Scholars Find Indefensible*, N.Y. TIMES (Apr. 1, 2026), https://www.nytimes.com/2026/04/01/us/politics/trumps-birthright-citizenship-order-draws-lines-scholars-find-indefensible.html [https://perma.cc/J25E-67HK].

[14] Exec. Order No. 14,160, 90 Fed. Reg. 8449, 8449 (Jan. 20, 2025).

[15] *CASA*, 145 S. Ct. at 2549. The plaintiffs also alleged that the policy violated section 201 of the Nationality Act of 1940, 8 U.S.C. § 1401. *See id.*

[16] *Id.* at 2550, 2562–63. In December 2025, however, the Court agreed to decide the legality of the Trump Administration's birthright citizenship order. Trump v. Barbara, *cert. granted before final judgment*, No. 25-365, 2025 WL 3493157 (U.S. Dec. 5, 2025). The question presented in *Barbara* "is whether the Executive Order complies on its face with the Citizenship Clause and with 8 U.S.C. [§] 1401(a)." Petition for a Writ of Certiorari Before Judgment at i, *Barbara*, No. 25-365 (Sep. 26, 2025). Oral argument occurred on April 1, 2026, and a decision is expected in June or July. *See* Abbie VanSickle, *Key Justices Appear Skeptical of Limiting Birthright Citizenship*, N.Y. TIMES (Apr. 1, 2026), https://www.nytimes.com/2026/04/01/us/politics/supreme-court-birthright-citizenship-arguments.html [https://perma.cc/TGU5-PHUB]. This Essay went to print before the Court handed down its decision in *Barbara*.

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

[18] *CASA*, 145 S. Ct. at 2548 & n.1, 2550.

[19] *Id.* at 2562; *see id.* at 2550, 2557.

[20] *Id.* at 2550; *see also id.* at 2550 n.4 (emphasizing that "[o]ur decision rests solely on the statutory authority that federal courts possess under the Judiciary Act of 1789").

plaintiffs before the court."[21] The opinion noted that "'[c]omplete relief' is not synonymous with 'universal relief.'"[22]

To be clear, then, *CASA* did not categorically reject "universal" injunctions.[23] As described in more detail below, it did not rule out the possibility of using a class action to obtain the kind of broad relief awarded by the lower courts in the birthright citizenship challenges.[24] The Court also did not address whether the Administrative Procedure Act's[25] (APA) provision authorizing federal courts to "hold unlawful and set aside agency action"[26] empowers the federal judiciary to render such actions completely legally ineffective if they violate federal law.[27] In addition, the majority did not specify how to determine whether a "universal" injunction was "necessary and appropriate" to ensure "complete relief" in any particular non-class case. With respect to the birthright citizenship litigation, the Court left that for the lower courts to address.[28] For example, the *CASA* majority noted — but did not resolve — the argument that the *states* that had filed lawsuits challenging the birthright citizenship order would need a "universal" injunction against the policy to obtain complete relief.[29]

II. Remedies and Judicial Review

This Part references the long-intertwined relationship of judicial review and remedies (injunctions, in particular) as a context for understanding some of the ways that the *CASA* majority stands poised to negatively affect substantive rights in its wake. This fate is not sealed, however, and it both can and should be avoided.

In the United States, there have been battles over judicial review and remedies dating back at least to the time of *Marbury v. Madison*.[30] When the outcome of such a contest narrows the proper purview of judicial review, federal courts have a decreased ability to provide relief to otherwise meritorious plaintiffs. Consequently, those plaintiffs' substantive rights go unredressed, and there is an effective narrowing of the scope of those rights.[31] The Court's decision in *CASA* could have such an effect. Where, before *CASA*, federal courts often wholly enjoined the

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[21] *Id.* at 2557.

[22] *Id.*

[23] *See* Mila Sohoni, Essay, *In* CASA *You Missed It*, 78 STAN. L. REV. (forthcoming 2026) (manuscript at 18–19), https://ssrn.com/abstract=5799882 [https://perma.cc/MR5Q-CFBC].

[24] *See infra* notes 85–88 and accompanying text.

[25] 5 U.S.C. §§ 551–559, 701–706.

[26] *Id.* § 706(2).

[27] *CASA*, 145 S. Ct. at 2554 n.10.

[28] *Id.* at 2563; *see also id.* at 2589–90 (Sotomayor, J., dissenting) (noting that "the majority leaves open whether these particular injunctions may pass muster under its ruling," *id.* at 2589).

[29] *Id.* at 2558 (majority opinion) ("The complete-relief inquiry is more complicated for the state respondents . . . .").

[30] 5 U.S. (1 Cranch) 137 (1803).

[31] *See infra* notes 38–39 and accompanying text.

unconstitutional or otherwise illegal actions of governmental defendants, prevailing individual plaintiffs could now face difficulties obtaining similar relief.

A. The Necessity of Remedy for Meaningful Judicial Review

The concept of judicial review is often associated with Chief Justice Marshall's famous instruction from *Marbury*: "It is emphatically the province and duty of the judicial department to say what the law is."[32] But judicial review is more than just the power "to say." *Marbury* also quoted jurist William Blackstone to support the proposition that "it is a general and indisputable rule, that where there is a legal right, there is also a legal *remedy* by suit or action at law."[33] Supreme Court Justices have gone so far as suggesting that that maxim "lies at the very foundation of all systems of law."[34] The *Marbury* Court described this principle as "[t]he very essence of civil liberty" and opined that providing a legal remedy for a violation of a legal right is "[o]ne of the first duties of government."[35] Moreover, the *Marbury* Court noted that laws and acts that are "repugnant to the [C]onstitution [are] void."[36]

Judicial review, therefore, is sometimes necessary "to check the abuse of power that presents the most serious threat to the rule of law."[37] But the ability to check that abuse can be undermined through retrenching the remedies that are available when individuals, entities, and government officials violate "what the law is." Constitutional rights (and other rights) only truly exist to the extent that violations of the rights can be

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[32] *Marbury*, 5 U.S. (1 Cranch) at 177.
[33] *Id.* at 163 (emphasis added) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).
[34] United States v. Loughrey, 172 U.S. 206, 232 (1898) (White, J., dissenting).
[35] *Marbury*, 5 U.S. (1 Cranch) at 163.
[36] *Id.* at 177.
[37] City of Chicago v. Barr, 961 F.3d 882, 918 (7th Cir. 2020).

remedied.[38] Unnecessary restrictions on the federal judiciary's ability to grant remedies undermine the substantive rights themselves.[39]

Judicial review and its attendant remedies are not topics that are free from controversy, of course. Discourse about the propriety of judicial remedies to vindicate federal law figured prominently during the earliest days of our nation,[40] and it has persisted in the centuries since.[41] Jurists,

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[38] *See, e.g.*, Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 735–36 (1992) (noting the "realist insight . . . that there is an intimate connection between right and remedy" because "[w]ithout an available and enforceable remedy, a right may be nothing more than a nice idea" (citing EDWIN N. GARLAN, LEGAL REALISM AND JUSTICE 44 (1941) ("Absence of remedy is absence of right."))); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 888 (1999) ("Call this right-remedy relationship *remedial substantiation*, meaning just that the practical value of a right is determined by its associated remedies."); Portia Pedro, *The Myth of the "Nationwide Injunction,"* 84 OHIO ST. L.J. 677, 709–11 (2023) (describing "the right-remedy nexus"); Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 80 (2007) ("Remedies are the practical, real, and functional component that actualizes the right and makes it operational between the parties."). Professor Daryl Levinson's concept of remedial equilibration describes the "inextricably intertwined" nature of rights and remedies, Levinson, *supra*, at 858, and explains that "constitutional rights are inevitably shaped by . . . remedial concerns," *id.* at 873.

[39] Levinson, *supra* note 38, at 887–88 (arguing that "rights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies," *id.* at 887); Pedro, *supra* note 38, at 710–11 ("[T]he limited contour of the remedy is the device through which the functionality of the right is reined in and through which the right itself is contracted or even abrogated." *Id.* at 711.).

[40] Some debated whether courts could not, and should not, interpret the Constitution in order to determine whether a law was constitutional. *See Marbury*, 5 U.S. (1 Cranch) at 176–79. In the event that courts could do so, others considered whether judges should, at most, choose not to apply the unconstitutional statute instead of giving the injured plaintiff a remedy. *See, e.g.*, *id.* at 178–80; BRUTUS NO. XV (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 440–42 (Herbert J. Storing ed., 1981). Brutus was a pseudonymous antifederalist essayist. *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1151 (2003); Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067, 1097 (2012).

[41] Consider, for example, the scholarly reaction to the Supreme Court's decision in *Brown v. Board of Education* (*Brown I*), 347 U.S. 483 (1954), and its subsequent decision regarding the remedial questions in those cases, *Brown v. Board of Education* (*Brown II*), 349 U.S. 294, 300–01 (1955) (reversing and remanding cases, except the Delaware case that required "immediate" integration, to district courts for those courts to issue injunctive orders and decrees as needed to require the defendants "to admit [the parties] to public schools on a racially nondiscriminatory basis with all deliberate speed," *id.* at 301). The litigation over desegregating public schools — viewed as a paradigm for cases with claims that involve social issues, civil rights issues, and impact litigation — prompted considerable discourse regarding, among other things, the existence of "neutral principles" to justify *Brown*, whether social issues such as racial segregation are within the purview of federal courts, and whether a court should decline to issue an injunction or any remedy even after finding plaintiffs prevailed in demonstrating harm. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959); Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47–51 (1961). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (discussing *Brown* and other school desegregation cases as paradigmatic in both "epitomiz[ing]" and "challeng[ing]," *id.* at 244, his arguments about the role of the Supreme Court, including judicial review, the countermajoritarian difficulty, neutral principles, and judicial restraint). Somewhat more recently, scholars debated whether judicial review and litigation should

however, should not ignore the practical consequences of weakening the remedies that are available when federal law is violated.

*B. Injunctive Relief and Judicial Review Pre- and Post-*CASA

Prior to the Court's decision in *CASA*, the ability of even a single injured plaintiff to obtain a "universal" injunction requiring the government to comply with federal law gave those rights meaningful content in the real world — protecting all those whose rights would otherwise be violated.[42] When a government policy is illegal if applied "against *anyone*,"[43] an injunction of corresponding scope is hardly incongruous.[44] The underenforcement that results when such injunctions are unavailable is a real cost — one likely to fall disproportionately on marginalized communities whose members may lack the resources needed to *be* an individual, litigating plaintiff who would be entitled to "complete relief" under *CASA*.[45]

To be clear, individual plaintiffs may still be able to obtain "universal" injunctive relief even if one accepts *CASA*'s "complete relief" requirement on its own terms. When states or associations are plaintiffs, there may be an easier path to such injunctions — although it is far from guaranteed.[46] Consider too so-called "prophylactic" or "structural" injunctions against governmental entities — ones that cover a broader scope of actions to address the facilitators and causes of continued harm or that seek to reform the operation of institutions ranging from schools

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be limited to disputes that fit in the traditional or "private law" model of litigation, *see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365 (1978), to the exclusion of public law litigation and structural reform litigation models that adjudicate and provide meaningful remedies for constitutional and statutory violations. *See generally, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing that the bulk of federal court litigation does not fall within the traditional, private law model of adjudication, putting forth an account of the public law litigation model, and concluding "that the involvement of the court and judge in public law litigation is workable, and indeed inevitable if justice is to be done," *id.* at 1281); Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (describing the structural reform model of litigation and arguing that this type of adjudication is necessary to "fully secure[]" "our constitutional values," *id.* at 2).

[42] *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018); Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 62 (2017); Pedro, *supra* note 10, at 871–73.

[43] Trump v. CASA, Inc., 145 S. Ct. 2540, 2548 (2025).

[44] *See* Pedro, *supra* note 38, at 710 ("In circumstances where a court finds that the defendant's challenged actions violate rights, without limitation across a municipality, a state, the country, or the globe, the scope of the injunction could be, and perhaps should be or even must be, correspondingly broad.").

[45] *See id.* at 713–14 ("While many in the 'nationwide injunctions' debate have described the costs to defendants in these cases, very few have described what is at stake for plaintiffs, especially those from marginalized communities.").

[46] Sohoni, *supra* note 23 (manuscript at 16) (noting some challenges to state and associational standing).

to prisons.[47] Although such injunctions have also been attacked on numerous fronts,[48] they can be necessary to vindicate the underlying substantive rights.[49] In the words of the *CASA* decision and a dissent, some prophylactic or structural injunctions will be necessary to give even individual plaintiffs "complete relief."[50] After all, if the substantive law *entitles* the plaintiff to a certain institutional structure, then an injunction mandating that structure is the only "complete" remedy — even if others will benefit from that structure as well.

CASA does mean, however, that there likely will be some cases where — if pursued by a single or specific group of individual plaintiffs — a federal court may not issue an injunction requiring government officials to abandon an illegal policy or otherwise bring their general practices into compliance with federal law.[51] And that restriction on injunctions applies not only in the context of illegal actions by the federal government, but also illegal actions by state and municipal governments.[52] As the next Part will show, proceeding as a class action can overcome this remedial obstacle.

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[47] *See, e.g.*, Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 994 (2020) ("The most conspicuous and controversial prophylactic injunctions often involve structural reform of school systems, prisons, and mental hospitals.").

[48] *See, e.g.*, Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99, 99 n.3 (2007) (noting conservative criticism of prophylactic relief and citing articles that criticized "structural relief," "institutional remedies," "public law injunctions," "prescribing governmental policy," and "relief against state officials"); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1123–24 (1996); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 648–49 (1982) (considering several "difficulties" created by "[r]emedial decrees in institutional suits," *id.* at 648); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978); Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 142 (2022) (citing ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974)); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1422 (2007); *see also* Horne v. Flores, 557 U.S. 433, 447 n.3, 448 (2009) (stating that, due to federalism concerns, federal courts should be reluctant to issue injunctions that have "the effect of dictating state or local budget priorities," *id.* at 448, or that "substantially restrict[] [a state government's] ability . . . to make basic decisions regarding . . . policy," *id.* at 447 n.3).

[49] *See* Thomas, *supra* note 48, at 100 (noting that prophylactic relief "continues to thrive" in civil litigation); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 554 (2006); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018 (2004); Levinson, *supra* note 38, at 873–74.

[50] Trump v. CASA, Inc., 145 S. Ct. 2540, 2556–57 nn.11–12 (2025).

[51] *See id.* at 2557.

[52] As an interpretation of the Judiciary Act, the *CASA* majority's holding restricts the remedies available in federal court as a general matter, even if the challenged policy or practice is imposed at the state or local level. *See id.* at 2550 ("The issue before us is one of remedy: whether, under the Judiciary Act of 1789, federal courts have equitable authority to issue universal injunctions."). Nothing in the opinion indicates that its decision does not reach injunctions of state or local government actions. *See id.* at 2548–63 (nowhere does the Court limit the decision's holding to cases challenging federal government policies or practices).

III. FROM "UNIVERSAL" INJUNCTION TO CLASSWIDE COMPLIANCE INJUNCTION

In the wake of the Supreme Court's decision in *CASA*, attention has turned to *aggregation* as a way to obtain injunctive relief that can meaningfully enforce judicial review of government policies and practices by ensuring compliance with the law as interpreted and applied by the federal courts.[53] The most suitable aggregation device is a class action under Rule 23. Indeed, some of the plaintiffs in the cases before the Court in *CASA* promptly sought — and successfully obtained — class certification and classwide injunctive relief forbidding the Trump Administration from denying citizenship pursuant to the challenged executive order.[54]

We argue that, where large numbers of individuals are adversely affected by an illegal policy, a class action is certifiable under Rule 23, and a classwide compliance injunction against the relevant executive branch agencies and officials would be available to redress the effects of the government's illegal actions. The challenges to the Trump Administration's birthright citizenship order are paradigmatic examples: litigation seeking an injunction forbidding enforcement of a policy that is alleged to be unconstitutional or contrary to federal law.[55]

It is hard to state with certainty whether *every* case in which a "universal" injunction had been issued pre-*CASA* would also warrant class certification under Rule 23 post-*CASA*. Because the pre-*CASA* debate focused so intensely on the binary question of whether such injunctions are available *at all*,[56] the Supreme Court never squarely confronted the

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[53] *See generally* Marcus, *supra* note 9 (claiming that, "[f]ortunately, the class action remains a potent and viable substitute" that can "bridge the gap between right and remedy that *Trump v. CASA* opened," *id.* at 5.).

[54] *See* Barbara v. Trump, 790 F. Supp. 3d 80, 105 (D.N.H. 2025) (granting class certification and a preliminary injunction as to "[a]ll current and future persons" in the categories covered by the birthright citizenship executive order); CASA, Inc. v. Trump, 793 F. Supp. 3d 703, 730 (D. Md. 2025) (granting class certification); CASA, Inc. v. Trump, 793 F. Supp. 3d 687, 691 (D. Md. 2025) (granting classwide preliminary injunction). Class actions have also been certified in other challenges to Trump Administration policies in the wake of *CASA*. *See, e.g.*, Bautista v. Santacruz, 813 F. Supp. 3d 1084, 1106 (C.D. Cal. 2025); Pacito v. Trump, 796 F. Supp. 3d 692, 702 (W.D. Wash. 2025).

[55] *See CASA*, 145 S. Ct. at 2549 (noting the plaintiffs' claims that "the Executive Order violates the Fourteenth Amendment's Citizenship Clause, § 1, as well as § 201 of the Nationality Act of 1940, 54 Stat. 1138 (codified at 8 U.S.C. § 1401)").

[56] *See, e.g.*, Pedro, *supra* note 38, at 692–93 (describing and citing scholarly arguments that federal courts do not have the authority to issue such injunctions, including the arguments in Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018)); Frost, *supra* note 42, at 1090 ("As this discussion of the constitutionality of nationwide injunctions illustrates, the Constitution's text does not bar such injunctions.").

factors that should inform whether, in any particular case, an individual party who was injured by an illegal policy should be entitled to a "universal" injunction.[57] Our point here is simply that, in the post-*CASA* world, Rule 23 provides a sensible supplementary framework for providing such relief in appropriate cases.

A. Class Certification Under Rule 23

The black-letter law on class actions in federal court starts with Rule 23, the current structure of which took effect in 1966.[58] Any class action must satisfy all four requirements of Rule 23(a) — which go by the shorthand "numerosity, commonality, typicality, and adequacy of representation"[59] — and fall into one of the categories set forth in Rule 23(b).[60] Of the Rule 23(b) categories, the most relevant is Rule 23(b)(2), which is satisfied when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[61]

The post-*CASA* district court decisions certifying class actions in challenges to the birthright citizenship order illustrate why such cases cleanly satisfy the requirements of Rule 23(a) and Rule 23(b)(2). As for Rule 23(a)(1), such a class is certainly "so numerous that joinder of all members is impracticable."[62] In general, a policy of nationwide scope like the birthright citizenship order is likely to impact an exceptionally large group of individuals; evidence shows that this order in particular would deny citizenship to hundreds of thousands of babies each year.[63] Turning to Rule 23(a)(2), a classwide constitutional challenge to such a policy certainly presents "questions of law or fact common to the class."[64]

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[57] In her *CASA* dissent, Justice Sotomayor recognized that "as a matter of equitable discretion, courts may often have weighty reasons not to award universal relief." *CASA*, 145 S. Ct. at 2584 (Sotomayor, J., dissenting). For the *CASA* dissenters, however, the presence of such "prudential considerations" did not justify the majority's conclusion that this type of broad relief was categorically unauthorized. *Id.* at 2585 n.3.

[58] *E.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) ("Rule 23 . . . gained its current shape in an innovative 1966 revision.").

[59] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010). Stated in full, Rule 23(a)'s elements are: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

[60] FED. R. CIV. P. 23(b).

[61] *Id.* 23(b)(2).

[62] *Id.* 23(a)(1).

[63] *See* CASA, Inc. v. Trump, 793 F. Supp. 3d 703, 718 (D. Md. 2025).

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

In the birthright citizenship cases, one district court articulated the common question as follows: "Does the Executive Order violate the Fourteenth Amendment's Citizenship Clause and the INA?"[65] The claims of the named plaintiffs are "typical" of the class's claims (as required for Rule 23(a)(3)) for essentially the same reason.[66] As the Supreme Court has explained, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge";[67] if claims are based on the same kind of injury (the denial of citizenship) and the same legal theory (the illegality of the policy leading to the denial of citizenship), then those claims would be "typical" of one another for this purpose.[68]

Rule 23(a)(4)'s requirement that the class representatives "will fairly and adequately protect the interests of the class"[69] may require some fact-specific scrutiny of the particular named plaintiffs and their counsel.[70] Crucially, however, the kinds of cases for which a classwide compliance injunction is sought involve class members who are similarly impacted by an allegedly illegal federal policy. They thus have the alignment of interests that supports a finding of adequate representation.[71] As long as there are no concerns regarding "competency and conflicts of class counsel,"[72] Rule 23(a)(4) will be satisfied in such cases.[73]

That leaves Rule 23(b)(2), whose text and design squarely cover this scenario: "[T]he party opposing the class" (the relevant government agency) "has acted or refused to act on grounds that apply generally to the class" (adopting or implementing the challenged policy), "so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole" (an order requiring compliance with

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[65] *CASA*, 793 F. Supp. 3d at 718–19; *see also* Barbara v. Trump, 790 F. Supp. 3d 80, 93 (D.N.H. 2025) ("Petitioners raise several common questions of law, including whether the Executive Order violates the Constitution and § 1401 . . . .").

[66] *See* FED. R. CIV. P. 23(a)(3).

[67] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011) (alteration in original) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)).

[68] *See CASA*, 793 F. Supp. 3d at 722 (finding that, to satisfy typicality, "claims must 'arise[] from the same event, practice, or course of conduct that gives rise to the claims of other class members' and be 'based on the same legal theory'" (alteration in original) (quoting 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:29 (6th ed. 2022))).

[69] FED. R. CIV. P. 23(a)(4).

[70] 7A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE: § 1765 (4th ed. 2025) ("What constitutes adequate representation is a question of fact that depends on the circumstances of each case.").

[71] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *see also* Trump v. CASA, 145 S. Ct. 2540, 2586 (2025) (Sotomayor, J., dissenting) (noting that the plaintiff parents in the birthright citizenship litigation "adequately represent" other parents because "[l]ike all affected parents, they 'are necessarily interested in obtaining the relief sought' to preserve their children's citizenship" (quoting Emmons v. Nat'l Mut. Bldg. & Loan Ass'n of N.Y., 135 F. 689, 691 (4th Cir. 1905))).

[72] *Amchem*, 521 U.S. at 626 n.20.

[73] *See, e.g.*, *CASA*, 793 F. Supp. 3d at 723 ("They share the same injury, the same objections, the same factual and legal positions, and the same interest in challenging the Executive Order.").

the constitutional or statutory provisions that are the basis for the challenge).[74]

As the advisory committee notes to Rule 23(b)(2) explain, "[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on *grounds which have general application to the class*."[75] Rule 23(b)(2) is satisfied even if "members are incapable of specific enumeration."[76] The role of (b)(2) class actions in protecting groups from policies violating their civil rights is so well-established that "[t]he (b)(2) class action is often referred to as an 'injunctive' class suit or . . . as a 'civil rights' class action."[77]

B. Refuting the Class Certification Skeptics

The Trump Administration has vigorously resisted certification of class actions in the birthright citizenship challenges.[78] To deny class certification in these cases would mean that a federal court could still order the Trump Administration to recognize the birthright citizenship of the children whose parents are named plaintiffs in these cases.[79] But the Trump Administration could continue to violate the Constitution and federal statutory law with respect to other children born in the United States. In this section, we identify and respond to some of the principal lines of arguments the Trump Administration and others have made in opposing class certification in these kinds of cases.

1. CASA *Creep.* — One argument that appears in some of the Trump Administration's briefs opposing class certification[80] — as well

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

75 *Id.* advisory committee's note to 1966 amendment (emphasis added).

76 *Id.*

77 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 20:46 (5th ed. 2012); *see also* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1165 n.72 (1998) ("'Structural' injunction suits are frequently brought under (b)(2).").

78 *See, e.g.*, *CASA*, 793 F. Supp. 3d at 712; Barbara v. Trump, 790 F. Supp. 3d 80, 98 (D.N.H. 2025).

79 Whether the Trump Administration would follow even such a plaintiff-specific remedy is not entirely clear, given statements by various officials questioning their obligation to comply with federal judicial orders. *See, e.g.*, Brandon Drenon & Anthony Zurcher, *Vance Questions Authority of US Judges to Challenge Trump*, BBC NEWS (Feb. 10, 2025), https://www.bbc.com/news/articles/c4gx3j5k63xo [https://perma.cc/VGK8-AYCN]; Amanda Taub, *"This Is Worse": Trump's Judicial Defiance Veers Beyond the Autocrat Playbook*, N.Y. TIMES: THE INTERPRETER (Mar. 20, 2025), https://www.nytimes.com/2025/03/20/world/europe/trump-courts-defiance-autocrats-playbook.html [https://perma.cc/TF2U-NKBY].

80 *See, e.g.*, Defendants' Memorandum of Law in Objection to Plaintiffs' Motion for Class Certification and Appointment of Counsel and Plaintiffs' Motion for Classwide Preliminary Injunction at 16, *Barbara*, 790 F. Supp. 3d 80 (No. 25-cv-00244) [hereinafter Defendants' D.N.H. Memo] (arguing that certification of a "nationwide" class should not allow "an end-run around the now forbidden universal injunction").

as in one of the *CASA* concurring opinions[81] — is the suggestion that any approach to Rule 23 that would facilitate classwide compliance injunctions is inherently suspect because the *CASA* decision restricted "universal" injunctions in the non-class context. This move might be called "*CASA* creep" because it seeks to extend the general gestalt of the *CASA* decision to resolve distinct doctrinal issues regarding the certification of class actions. It is a move that courts — including the Supreme Court — should rebuff.

The reasoning in the *CASA* majority opinion rejected only the notion that the Judiciary Act of 1789 "granted federal courts the authority to universally enjoin the enforcement of an executive or legislative policy"[82] when such an injunction is *not* necessary or appropriate to provide complete relief to the individual plaintiffs who have sued. Providing one example, Justice Barrett wrote that "prohibiting enforcement of the Executive Order against the child of an individual pregnant plaintiff will give that plaintiff complete relief" because "[h]er child will not be denied citizenship."[83] A so-called "universal" injunction would not be statutorily authorized because "[e]xtending the injunction to cover all other similarly situated individuals would not render *her* relief any more complete."[84]

Moreover, the *CASA* majority recognized the fundamental difference between the individual-plaintiff scenario and a class action. Justice Barrett rejected the plaintiffs' analogy to the historical "bill of peace" precisely because, as she opined, that Founding-era remedial device had "evolved into the modern class action, which is governed in federal court by Rule 23 of the Federal Rules of Civil Procedure."[85] According to the majority, awarding "universal" injunctions in individual-plaintiff cases is problematic because doing so "circumvent[s] Rule 23's procedural protections"[86] and effectively "create[s] *de facto* class actions."[87] Justice Barrett concluded with this rhetorical question: "Why bother with a Rule 23 class action when the quick fix of a universal injunction is on the table?"[88]

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[81] *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2566 (2025) (Alito, J., concurring) (warning that "the universal injunction will return from the grave under the guise of 'nationwide class relief,' and today's decision will be of little more than minor academic interest").

[82] *Id.* at 2550 (majority opinion); *see also id.* at 2551 (noting that its reasoning is an interpretation of statutory authority granted to courts under section 11 of the Judiciary Act of 1789).

[83] *Id.* at 2557.

[84] *Id.* at 2557–58. As discussed *supra* notes 28–29 and accompanying text, the Court ultimately did not hold that any *particular* plaintiff in the birthright citizenship challenges could not obtain a "universal" injunction.

[85] *Id.* at 2555.

[86] *Id.* at 2556.

[87] *Id.* (quoting Smith v. Bayer Corp., 564 U.S. 299, 315 (2011)).

[88] *Id.*

The majority opinion's discussion of class actions reflects the scholarly discourse on "universal" injunctions.[89] The existence of class actions was often noted as a foil for such injunctions, with some positing that federal courts could, or should, enjoin illegal or unconstitutional governmental action in full only if the underlying litigation was a class action.[90] Relatedly, commentators argued that the existence of class actions indicated that there was no need for compliance injunctions as a remedy.[91] It would be perverse to point to *CASA* as grounds to *refuse* class actions when the *CASA* majority opinion — and academic skeptics of "universal" injunctions — cite the availability of class actions as a reason *not* to allow "universal" injunctions in individual-plaintiff actions.[92]

2. The Easily Repressible Myth of Wal-Mart. — Opponents of class certification have also relied on cherry-picked language from the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*[93] regarding Rule 23(b)(2) class actions.[94] *Wal-Mart* was an employment discrimination class action seeking, among other things, backpay for over one million class members based on Wal-Mart policies that allegedly violated federal law.[95] As such, *Wal-Mart* was far from the typical Rule 23(b)(2) class action. But, because the class was also seeking injunctive relief, the plaintiffs in *Wal-Mart* argued that it could be certified under Rule 23(b)(2) even as to the requested monetary relief.[96]

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[89] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 464–65, 475–76 (2017) (arguing that the issuance of "universal" injunctions is inconsistent with various doctrines including class action relief); Malveaux, *supra* note 42, at 58–60 (describing Professor Bray's criticism that "universal" injunctions are in tension with Rule 23(b)(2)).

[90] *See, e.g.*, Pedro, *supra* note 38, at 696 (describing and citing scholarship arguing that federal courts should only issue such injunctions in certified class actions, including Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 (2016)).

[91] *See, e.g.*, Bray, *supra* note 89, at 475–76; *Developments in the Law — Chapter Four: District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1709 (2024).

[92] If this "*CASA* creep" argument proves successful, it would be a troubling example of what Professor Leah Litman has called "disingenuous substitution." Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1482, 1512 (2018).

[93] 564 U.S. 338 (2011).

[94] *See infra* notes 98–99 and accompanying text. Another aspect of the *Wal-Mart* decision involved Rule 23(a)(2)'s common question requirement. The *Wal-Mart* majority found that the kind of "common question" needed for purposes of Rule 23(a)(2) "must be 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." 564 U.S. at 350. This standard is easily met in class actions like those certified in the birthright citizenship litigation, because the legal claims of the entire class hinge on the constitutionality of the challenged executive branch policies. *See, e.g.*, CASA, Inc. v. Trump, 793 F. Supp. 3d 703, 720 (D. Md. 2025) ("When the Court determines whether the Executive Order is constitutional and whether it violates the INA, it will resolve 'in one stroke' the issue that is central to the validity of the class claims." (quoting *Wal-Mart*, 564 U.S. at 350)).

[95] *Wal-Mart*, 564 U.S. at 342–43.

[96] *See id.* at 360, 363, 365.

The Supreme Court unanimously rejected the plaintiffs' reading, reasoning that "claims for *individualized* relief (like the backpay at issue here) do not satisfy [Rule 23(b)(2)]."[97] Obviously, an injunction that the executive branch refrain from enforcing an unconstitutional policy against *anyone* is the polar opposite of "*individualized* relief." Opponents of classwide compliance injunctions, however, have emphasized the following statement from the *Wal-Mart* opinion: "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.'"[98] The logic seems to be that a compliance injunction is not truly "indivisible" because the challenged policy can — in theory — be "enjoined or declared unlawful" one plaintiff at a time. For example, a court could issue an injunction that one particular individual born in the United States is a U.S. citizen without necessarily ordering that others are entitled to citizenship.[99]

This reading of *Wal-Mart* is misguided. As the Supreme Court made clear in the very next sentence of the *Wal-Mart* opinion, Rule 23(b)(2) covers situations in which "a single injunction or declaratory judgment would provide relief to each member of the class."[100] An injunction forbidding the executive branch from enforcing an unconstitutional policy certainly "would provide relief to each member of the class." Accordingly, *Wal-Mart*'s own metric confirms the propriety of Rule 23(b)(2) class actions in this context.[101]

But there's more. The Court in *Wal-Mart* went on to explain that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture" and that "the Rule reflects a series of decisions involving challenges to racial segregation — *conduct that was remedied by a single classwide*

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[97] *Id.* at 360.

[98] *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)); *see also, e.g.*, Defendants' D.N.H. Memo, *supra* note 80, at 10–11 (quoting this language); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification at 9, 11, N.Y. Immigr. Coal. v. Trump, No. 25 Civ. 1309 (S.D.N.Y. filed July 18, 2025) [hereinafter Defendants' S.D.N.Y. Memo] (same); Pedro, *supra* note 38, at 685 n.33 ("The benefit of an injunction is divisible (or some say that the right at issue is divisible) if defendants 'could refrain from applying the challenged policy or provision to a named plaintiff [or designated class] and could continue applying the policy or provision to every other person similarly situated.'" (alteration in original) (quoting Pedro, *supra* note 10, at 865 n.54)).

[99] *See* Defendants' D.N.H. Memo, *supra* note 80, at 11 (arguing that "the relief that Plaintiffs seek is not 'indivisible'" because "it can be parceled out to different class members based on their particular circumstances *in the form of party-specific injunctions*" (emphasis added)).

[100] *Wal-Mart*, 564 U.S. at 360.

[101] Relatedly, *Wal-Mart* states that Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id.* A classwide compliance injunction would be a *single* injunction benefitting the entire class.

order."[102] Like challenges to unconstitutional racial segregation, a challenge to an illegal executive branch policy is "remedied by a single classwide order," specifically, an order requiring the executive branch to cease enforcement of that policy in order to comply with federal law. In the same vein, the *Wal-Mart* Court stressed that Rule 23(b)(2) is satisfied "[w]hen a class seeks an indivisible injunction benefiting all its members at once."[103]

3. The Protection Racket. — It is common for those opposing class certification to argue that they are simply trying to protect absent class members from having *their* interests adversely affected if a class action is certified.[104] Justice Alito's *CASA* concurrence, for example, warned that "a hasty application of Rule 23 . . . can have drastic consequences, creating 'potential unfairness' for absent class members."[105]

The interests of absent class members are — and should be — crucial components of the Rule 23 inquiry for class certification. *No* class action can proceed unless the court finds that the named class representatives will adequately represent those interests.[106] With that check in place, it is hard to see how refusing class certification benefits anyone but the defendants who wish to continue their illegal behavior. Accordingly, when defendants profess concern about protecting the very

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[102] *Id.* at 361 (alteration in original) (emphasis added) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)).

[103] *Id.* at 362. Professor Richard Nagareda's article — from which the Supreme Court quoted — reflects the same view. Reliance on Rule 23(b)(2) would be inappropriate only when "dissimilarity" within the class "has the capacity to undercut the indivisible character *of an appropriate remedy*." Nagareda, *supra* note 98, at 132 (emphasis added). A compliance injunction sought by a Rule 23(b)(2) class is an "appropriate remedy" that is unquestionably "indivisible."

[104] *See, e.g.*, S. REP. No. 109-14, at 66 (2005) (report on the Class Action Fairness Act) (arguing that, "[w]hen judges indiscriminately certify class actions, unnamed plaintiffs lose important legal rights and can be denied appropriate awards for their injuries"); *id.* at 85 (minority views of Sens. Leahy, Kennedy, Biden, Feingold, and Durbin) ("Proponents of this legislation claim that S. 5 will protect consumers . . . yet consumer advocates overwhelmingly oppose these alleged 'reforms.'").

[105] Trump v. CASA, Inc., 145 S. Ct. 2540, 2566 (2025) (Alito, J., concurring) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)). Although the phrase "potential unfairness" does indeed appear in the *Falcon* opinion, it is a complete non sequitur with respect to Rule 23(b)(2) class actions seeking compliance injunctions against illegal federal policies. The "potential unfairness" in *Falcon* stemmed from the fact that — while the named plaintiff had alleged that *he* suffered ethnicity-based discrimination in violation of Title VII — he alleged no questions of law or fact that were common to the putative class. 457 U.S. at 158 (noting the lack of "any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent"). In cases like the birthright citizenship challenges — or others that hinge on the legality of explicitly declared federal policies — such common questions clearly exist, and a classwide injunction against the challenged policy is squarely in the purview of Rule 23(b)(2).

[106] *See supra* notes 69–73 and accompanying text. Limits on the preclusive effect of class action judgments provide added protection for absent class members. *See* Cooper v. Fed. Rsrv. Bank of Richmond, 467 U.S. 867, 880 (1984) (holding that a class action that resolves common issues against the plaintiff class will not have preclusive effect on claims of individual class members that hinge on individualized events); 18A WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 4455.2 (3d ed. 2025).

victims of that behavior, it is hard to avoid comparisons to a mafia boss offering "protection" to local businesses.

That said, there can be potential value in allowing individuals to control litigation of their own claims — even when the requirements of Rule 23 are satisfied. In the context of money damages class actions (which are usually covered by Rule 23(b)(3) rather than (b)(2)[107]), that option is assured by the fact that a Rule 23(b)(3) class action guarantees class members notice and the opportunity to opt out of the class.[108] Courts have discretion, however, to extend notice and opt-out rights to Rule 23(b)(2) class actions as well.[109] Accordingly, if there is any worry that certification of a class action for purposes of injunctive relief will have an unacceptable impact on litigant autonomy, a court can obviate that concern by ordering notice and the right to opt out.

IV. IMPLICATIONS OF THE CLASS ACTION ROUTE

This Part addresses some implications of using Rule 23 class actions to obtain injunctions that forbid the executive branch from implementing policies and practices that violate federal law. Section A describes the crucial functional connection between individual-plaintiff "universal" injunctions and class actions — a connection that bolsters the doctrinal argument set out in Part III for class certification in these kinds of cases. Section B acknowledges some possible sources of mischief that may arise from requiring Rule 23 certification in this context.

A. The Core Connection Between Class Actions and "Universal" Injunctions

That class actions are well suited to serve the remedial goals that have been served by individual-plaintiff "universal" injunctions is not a surprise, because both serve a common function. Both are valuable devices for overcoming practical obstacles to *enforcement* of legal obligations. Most crucially, our judicial system's commitment to "Equal

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[107] *See, e.g.*, *Wal-Mart*, 564 U.S. at 362 (noting that the structure of Rule 23 makes it "clear that individualized monetary claims belong in Rule 23(b)(3)").

[108] *See* FED. R. CIV. P. 23(c)(2)(B).

[109] *See, e.g.*, Eubanks v. Billington, 110 F.3d 87, 94–95 (D.C. Cir. 1997); Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 582 (7th Cir. 2000). Indeed, Rule 23(c)(1)(C) authorizes the district court to alter or amend the definition of a Rule 23(b)(2) class any time "before final judgment," FED. R. CIV. P. 23(c)(1)(C); this allows the court to exclude from the class those who opt out, *see* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.221 n.821 (2004) ("A court is not precluded from defining a class under Rule 23(b)(1) or (b)(2) to include only those potential class members who do not opt out of the litigation.").

Justice Under Law"[110] does not necessarily assure *access* to justice. Not every individual who is impacted by illegal behavior has the ability to obtain a lawyer and to initiate a lawsuit to remedy that behavior.

Prior to *CASA*, "universal" injunctions were an important corrective to this enforcement gap.[111] The *CASA* dissents emphasized that denying such injunctions would leave government officials free to violate federal law as to anyone who had not filed their own lawsuit. As Justice Sotomayor put it: "Until the day that every affected person manages to become party to a lawsuit and secures for himself injunctive relief, the Government may act lawlessly indefinitely."[112] Justice Jackson warned that the *CASA* majority created a "zone of lawlessness" — "a void that renders the Constitution's constraints irrelevant to the Executive's actions" — for all individuals who lack "the wherewithal to lawyer up."[113]

Class actions also address systemic underenforcement.[114] This concern, in fact, was a key driver of the 1966 amendments to Rule 23. Professor Benjamin Kaplan — the reporter of the Advisory Committee that drafted the 1966 amendments[115] — explained that the rule was designed to enable enforcement of substantive law even with respect to individuals who are unable to take the "affirmative step" of initiating or participating in litigation,[116] adding that "[t]he moral justification for treating such people as null quantities is questionable."[117]

Accordingly, using Rule 23 to provide the kind of comprehensive injunctive relief available via non-class litigation prior to *CASA* reflects the common function of class actions and "universal" injunctions. To be clear, there is nothing in the *CASA* decision that calls into question the desirability of this enforcement function. Faced with what she called

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110 Diamond Alt. Energy, LLC v. EPA, 145 S. Ct. 2121, 2152 (2025) (Jackson, J., dissenting) (noting "the single phrase inscribed atop the entrance to our courthouse," presumably referring to the Supreme Court building).

111 *See supra* notes 42–45 and accompanying text.

112 Trump v. CASA, Inc., 145 S. Ct. 2540, 2594 (2025) (Sotomayor, J., dissenting); *see also id.* at 2573 (arguing that the majority's decision "renders constitutional guarantees meaningful in name only for any individuals who are not parties to a lawsuit").

113 *Id.* at 2603–04 (Jackson, J., dissenting); *see also id.* at 2604 ("[T]he zone of lawlessness the majority has now authorized will disproportionately impact the poor, the uneducated, and the unpopular . . . .").

114 *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 318 (2013) (noting that "because of the costs of litigation," restricting access to class actions "provides plaintiffs with only a hollow day in court that never reaches the merits" and that "[r]ealistically, the choice for class members is between collective access to the judicial system or no access at all").

115 Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 356 n.* (1967).

116 *See id.* at 397–98.

117 *Id.* at 398. Although Professor Kaplan made this point in explaining why Rule 23 rejected a requirement that class members affirmatively opt in to a Rule 23(b)(3) class action, *see id.* at 397–98, the point applies with equal (if not stronger) force to Rule 23(b)(2) class actions seeking injunctive relief, *see, e.g.*, Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 857–60 (2016); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 788–89 (2016).

"policy" critiques, Justice Barrett insisted that the majority's conclusion was compelled by "well-established precedent" regarding the remedies available to individual plaintiffs under the Judiciary Act.[118] But there are no such precedential or interpretive obstacles to using Rule 23 in precisely the way that its text and design support. To the contrary, the pragmatic alignment between pre-*CASA* "universal" injunctions and class actions reinforces the Rule 23 route to such remedies.

B. Larger Problems for Judicial Review

In the wake of the *CASA* decision, some have expressed concern that requiring class certification to obtain the equivalent of "universal" injunctions in individual-plaintiff cases will create problems.[119] This section identifies some of the ways that this extra procedural step could indeed create larger problems. While there is cause for concern, class certification alone should not fundamentally change the dynamics that existed prior to *CASA*.

One potential danger, of course, is that courts will misapply Rule 23 when class certification is sought in any given case. *CASA* creep — if it gains traction — may persuade lower courts to interpret *CASA* as imposing limitations that it actually does not impose, leading them to decide class certification or set the scope of injunctions for classes more restrictively than courts did pre-*CASA*.[120] Misreadings of general Supreme Court case law on class certification (like *Wal-Mart*)[121] and misguided rhetoric about the need to "protect" absent class members could also lead to overrestrictive class certification and injunction decisions.[122]

These risks are real. Requiring certification of a class action creates yet another potential procedural "friction point[]" or "stop sign[]" that can derail access to judicial remedies to vindicate substantive law.[123] It is certainly possible that a judge who would have resisted a "universal" injunction in a particular case before *CASA* may deploy the class-certification inquiry as a new weapon against such suits. But such a judge also would have had considerable discretion to refuse such an injunction

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118 *CASA*, 145 S. Ct. at 2560.

119 *See, e.g.*, Suzette Malveaux, *Class Actions, Already Weakened, Won't Replace Injunctions*, BLOOMBERG L.: US L. WEEK (July 16, 2025, at 04:30 ET), https://news.bloomberglaw.com/us-law-week/class-actions-already-weakened-wont-replace-injunctions [https://perma.cc/384C-WKPB]; *see also, e.g.*, Frost, *supra* note 42, at 1089 ("Class certification may be impossible or time consuming and difficult to obtain.").

120 *See supra* section III.B.1, pp. 1802–04 (discussing *CASA* creep).

121 *See supra* section III.B.2, pp. 1804–06 (discussing reliance on *Wal-Mart* in arguments against class certification post-*CASA*).

122 *See supra* section III.B.3, pp. 1806–07 (discussing the argument that class certification should be denied in order to protect absent class members).

123 Miller, *supra* note 114, at 309 ("[F]ederal courts have erected a sequence of procedural stop signs during the past twenty-five years that has transformed the relatively uncluttered pretrial process envisioned by the original drafters of the Federal Rules into a morass of litigation friction points.").

pre-*CASA*.[124] The key point here is that, post-*CASA*, plaintiffs have a very clean argument for class certification, and judges who are committed both to enforcing the underlying substantive law and to faithfully interpreting Rule 23 can easily justify a compliance injunction to protect the entire class.[125]

Another possible concern is the time and effort required to litigate and resolve the motion to certify a class action under Rule 23.[126] One should always be alert to the danger that unnecessary litigation costs and delays can render meaningful enforcement economically unviable.[127] That said, the kind of impact litigation involved in challenging illegal government action has never been a cost-free endeavor.[128] Relatedly, the additional time required to decide class certification could certainly pose a problem for government action that threatens immediate, irreparable harm. But the Supreme Court itself has recognized that a federal court can — when appropriate — grant immediate preliminary relief on behalf of a putative class even before it decides whether Rule 23 is satisfied.[129]

Finally, requiring the certification of a class action opens an additional avenue for participation by federal appellate courts. Litigants may immediately appeal a decision granting or denying class certification, although the appellate court has discretion whether to hear the appeal.[130] That decision by the appellate court, in turn, is ultimately reviewable by the Supreme Court.[131] As to that highest of appellate courts, some of the opinions in *CASA* indicate that the Supreme Court is likely to continue its aggressive intervention in such cases at very early stages,[132] despite the structure of the judiciary and deferential standards

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124 Trump v. CASA, Inc., 145 S. Ct. 2540, 2584 (2025) (Sotomayor, J., dissenting) ("Of course, as a matter of equitable discretion, courts may often have weighty reasons not to award universal relief.").

125 *See supra* section III.A, pp. 1800–1802.

126 *See CASA*, 145 S. Ct. at 2596 (Sotomayor, J., dissenting) (noting that to proceed as a class action, "a named plaintiff must incur the higher cost of pursuing class relief, which will involve, at a minimum, overcoming the hurdle of class certification").

127 *See, e.g.*, Miller, *supra* note 114, at 364–65 (describing how litigation burdens can "put[] this nation's longstanding legislative and judicial commitment to the private enforcement of its public policies and constitutional principles in harm's way," *id.* at 365).

128 *Cf., e.g.*, Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1091 (2007) (noting that actions seeking enforcement of civil rights are "often expensive and time-consuming claims").

129 *See* A.A.R.P. v. Trump, 145 S. Ct. 1364, 1369 (2025).

130 FED. R. CIV. P. 23(f); *id.* advisory committee's note to 1998 amendment ("Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals.").

131 *See, e.g.*, Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951, 1960 (2021) (reviewing class certification decision following a Rule 23(f) appeal to the Second Circuit).

132 *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2567–72 (2025) (Kavanaugh, J., concurring) (arguing that the Supreme Court "cannot hide in the tall grass" when presented with stay or injunction

of review.[133] That dynamic has been justifiably criticized,[134] but the reality is that the path to early appellate review already exists in these kinds of cases; they typically involve prompt requests for preliminary injunctive relief, and district court decisions on such requests are immediately appealable under 28 U.S.C. § 1292(a).[135] That class certification decisions are likewise appealable, therefore, is unlikely to empower appellate courts significantly more.

Using class actions to obtain "universal" injunctions will not be a frictionless path. Insofar as the process surrounding class certification creates greater obstacles to such injunctions, the class action route may invite the same underenforcement and skewing of substantive rights described earlier.[136] Nonetheless, under a proper understanding of Rule 23 and the options available to federal courts presiding over class actions, those courts possess the powers that they need to require compliance with federal law.

CONCLUSION

Judicial review is more than just the amalgamation of legal principles governing separation of powers, the institutional design of federal courts, and remedies doctrine. It protects real people from real damage when their rights are violated. By limiting the ability of federal courts to issue injunctions requiring government officials to respect those rights, the Supreme Court's *CASA* decision has the potential to undermine judicial review as we have come to know it. Yet, unlike a time of war or other emergency that a government might invoke to justify deviating from established constitutional norms, there is no corollary "state of exception"[137] for the federal judiciary to declare — after which courts

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applications, *id.* at 2570, and that "when it comes to the interim status of major new federal statutes and executive actions, it is often important for reasons of clarity, stability, and uniformity that this Court be the decider," *id.* at 2571).

133 *See* Ashcroft v. ACLU, 542 U.S. 656, 664–65 (2004) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 336 (1985) (O'Connor, J., concurring)); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 428 (2006); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 513–14 (2003); Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 299–301 (2005). By providing yet another route to early intervention by the Supreme Court, requiring class certification coheres with Professor Mark Lemley's diagnosis of an "Imperial Supreme Court," where Justices increasingly vest themselves with more power, including with respect to the lower federal courts. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 104–08 (2022).

134 *See, e.g.*, Lemley, *supra* note 133, at 106–08.

135 28 U.S.C. § 1292(a) ("[T]he courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions.").

136 *See supra* section II.A, pp. 1795–97.

137 For some discussion of the state of exception, see generally GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chi. Press 2005) (2003), and Devon W. Carbado, *States of Continuity or State of Exception? Race, Law and Politics in the Age of Trump*, 34 CONST. COMMENT. 1 (2019).

can switch judicial review back on. The change may be permanent. In the aftermath of *CASA*, the durability of judicial review may depend on whether aggregation procedures — particularly class actions — can fill the void the Supreme Court has created. Properly interpreted, Rule 23 provides a clean path for federal courts to continue to perform this function by certifying class actions and requiring government officials to comply with the law.