No. 25-365

IN THE
Supreme Court of the United States

DONALD TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

BARBARA, ET AL.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the First Circuit

BRIEF OF PROFESSOR MICHAEL T. MORLEY AND FLORIDA STATE UNIVERSITY ELECTION LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

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The FSU Election Law Center was established by the Florida Legislature to "[c]onduct and promote rigorous, objective, nonpartisan, evidence-based research concerning important constitutional, statutory, and regulatory issues relating to election law," FLA. STAT. § 1004.421(2)(a) (2025), including "[d]octrines relating to remedies," *id.* § 1004.421(1)(a)(13). The Center is empowered to "[p]rovide formal or informal assistance . . . to governmental entities or officials at the federal, state, or county levels, concerning elections or election law, including, but not limited to, research, reports, public comments, testimony, or briefs." *Id.* § 1004.421(3)(e). The Election Law Center operates pursuant to academic freedom protections. *Id.* § 1004.421(7). Accordingly, the Center's arguments and positions should not be attributed to Florida State University, the FSU College of Law, or either school's administration.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025), this Court held that Congress has not authorized federal district courts to issue "universal injunctions." Following that ruling, the district courts in both *CASA*, *see CASA, Inc. v. Trump*, 793 F. Supp. 3d 703 (D. Md. 2025), and this case, *Barbara v. Trump*, 790 F. Supp. 3d 80, 101 (D.N.H. 2025) (provisional certification to grant preliminary injunction for nationwide class), *cert. before judgment granted*, No. 25-365, 2025 WL 3493157 (U.S. Dec. 5, 2025), certified nationwide classes of all present and future rightholders to challenge President Trump's executive order purporting to curtail birthright citizenship.

This Court previously upheld the validity of nationwide classes under Federal Rule of Civil Procedure 23(b)(2) in challenges to the validity of federal legal provisions in *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979). Before reaffirming their use in this case, this Court should assess whether Rule 23(b)(2) adequately constrains their use, an adverse judgment is binding on absent class members who had neither notice of the case nor an opportunity to opt out, and future rightholders may be included within class definitions consistent with Article III and the Rules Enabling Act, 28 U.S.C. § 2072(b).

Moreover, nationwide class injunctions raise many of the same concerns as the type of universal injunctions this Court prohibited in *CASA*. In particular, they conflict with both this Court's ruling in *United States v. Mendoza*, 464 U.S. 154, 162 (1984), that the Government generally should be able to re-litigate adverse lower-court rulings in other

jurisdictions, as well as the reasons this Court set forth in support of that holding. Rather than facilitating all-or-nothing litigation before a single district judge in which the rights of potentially millions of people across the nation are at stake, this Court should instead consider potential alternatives.

In particular, this Court should consider allowing a district court ruling concerning the constitutionality, validity, or meaning of a federal legal provision in a case against government defendants to have *stare decisis* effect within that district. It might also allow district courts to certify ***circuitwide*** Rule 23(b)(2) classes—rather than nationwide classes—in such cases. This approach would empower the judiciary to enforce constitutional values and check the political branches while alleviating the strongest objections against nationwide class injunctions.

ARGUMENT

This brief addresses only the central remedial issue in this case: the district court's decision to provisionally certify, and issue injunctive relief in favor of, a nationwide class of rightholders, *Barbara v. Trump*, 790 F. Supp. 3d 80, 101 (D.N.H. 2025), *cert. before judgment granted*, No. 25-365, 2025 WL 3493157 (U.S. Dec. 5, 2025).

In *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2548 (2025), this Court held that district courts may not issue "universal injunctions" because they "likely exceed the equitable authority that Congress has granted to federal courts." A universal injunction, also referred to as a "nationwide injunction" or

"defendant-oriented injunction," is an injunction prohibiting the government defendants in a case from enforcing a challenged legal provision—or a particular interpretation of a challenged legal provision—against anyone, including third-party non-litigants. 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, 490-91 (2016) [hereinafter, "Morley, *De Facto Class Actions*"].

In order to continue granting effectively nationwide relief despite *CASA*'s restrictions, several courts have turned to certifying nationwide plaintiff classes pursuant to Federal Rule of Civil Procedure 23(b)(2), including the district courts in both *CASA* itself, *see CASA, Inc. v. Trump*, 793 F. Supp. 3d 703 (D. Md. 2025) (granting class certification), as well as this case, *Barbara*, 790 F. Supp. 3d at 101 (granting provisional certification to issue preliminary injunction for nationwide class).

Rule 23(b)(2) allows courts to certify classes where the defendant "has acted or refused to act on grounds that apply generally to the class, so that injunctive relief . . . is appropriate respecting the class as a whole." *Id.* In the 1979 case *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979), this Court approved certification of a nationwide class to challenge the validity of certain regulations under the Social Security Act.

More recently, numerous opinions in *CASA* recognized nationwide classes could be a valid alternative to universal injunctions. *See CASA*, 145 S. Ct. at 2566 (Alito, J., concurring) ("Rule 23 may

permit the certification of nationwide classes in some discrete scenarios."); *id.* at 2567 (Kavanaugh, J., concurring) ("[P]laintiffs who challenge the legality of a new federal statute or executive action and request preliminary injunctive relief may sometimes seek to proceed by class action under Federal Rule of Civil Procedure 23(b)(2) and ask a court to award preliminary classwide relief that may, for example, be . . . nationwide."); *id.* at 2596 (Sotomayor, J., dissenting) ("[T]he majority leaves untouched one important tool to provide broad relief to individuals subject to lawless Government conduct: Rule 23(b)(2) class actions for injunctive relief."); *see also id.* at 2556 (majority op.) (discussing "[t]he principal dissent's suggestion that these suits could have satisfied Rule 23's requirements"); *cf. A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1369 (2025) ("[T]his Court may properly issue temporary injunctive relief to the putative class in order to preserve our jurisdiction pending appeal").

This brief identifies some potential obstacles to this approach this Court has not yet addressed. It suggests two potential alternatives to certification of nationwide classes in lawsuits against government defendants to challenge federal legal provisions: allowing district courts to instead certify circuitwide classes and affording district court rulings stare decisis effect (at least in such cases) so third-party non-litigants may receive the benefit of their rulings.

I. NATIONWIDE CLASS INJUNCTIONS AGAINST THE GOVERNMENT UNDER RULE 23(B)(2) MAY BE INCONSISTENT WITH TRADITIONAL EQUITABLE PRINCIPLES

Nationwide class injunctions against the Government under Rule 23(b)(2) may be inconsistent with traditional equitable principles. In *CASA*, this Court held that statutory grants of equity jurisdiction authorize federal courts only to issue "those sorts of equitable remedies 'traditionally accorded by courts of equity' at our nation's inception." 145 S. Ct. at 2551 (quoting *Grupo Mexicano de DeSarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)). It concluded, "Neither the universal injunction nor any analogous form of relief was available in the High Court of Chancery in England at the time of the Founding." *Id.* The remedies which the Chancellor awarded were "party specific." *Id.* In particular, the Bill of Peace did not constitute an adequate precedent to justify universal injunctions because "unlike universal injunctions, which bind only the parties to the suit, decrees obtained in a bill of peace 'would bind all members of the group, whether they were present in the action or not.'" *Id.* at 2555 (quoting 7A C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1751, at 10 & n.4 (4th ed. 2021)).

At first blush, class certification appears to materially alter the posture of a case in ways that make nationwide relief appropriate under *CASA*. *See* Morley, *De Facto Class Actions?*, *supra* at 540. If a plaintiff class includes all rightholders impacted by a

challenged legal provision, then relief may properly run to all members of that class. *See Califano*, 442 U.S. at 701.

Despite these appearances, certification of a Rule 23(b)(2) class against the government might not materially change a case in any but the most formalistic sense. The procedural requirements for certification under Rule 23(b)(2) are in tension with the generally applicable modern Due Process requirements for subjecting class members to the *res judicata* effect of an adverse judgment. *See* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 638 (2017) [hereinafter, "Morley, *Rule 23(b)(2)*"]. The absence of mutual preclusion would distinguish Rule 23(b)(2) classes from the Bills of Peace which fell within the scope of traditional equitable principles. Nationwide class injunctions in Rule 23(b)(2) cases therefore may be functionally indistinguishable from the type of nationwide injunctions *CASA* rejected.

A. Nationwide Class Certification in Most Challenges to Federal Legal Provisions Will Likely Be a Mere Formality

As the numerous post-*CASA* rulings certifying provisional or actual nationwide classes under Rule 23(b)(2) demonstrate, that provision's requirements are easily satisfied, almost automatically, in challenges to the constitutionality, validity, or proper interpretation of a federal law, regulation, executive order, or policy, so long as the named plaintiffs have justiciable claims. Morley, *Rule 23(b)(2)*, *supra* at 637.

Rule 23(a)(1) states the class must be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). This numerosity requirement can be satisfied when a class involves even a few dozen members. *See Sanft v. Winnebago Indus.*, 214 F.R.D. 514, 522 (N.D. Iowa 2003) (collecting cases); *see also Weigand v. Maxim Healthcare Servs., Inc.*, No. 2:15-cv-4215-NKL, 2016 WL 127595, at *4 & n.2 (W.D. Mo. Jan. 11, 2016) (same). Federal legal provisions invariably impact enough people across the country to meet this standard. *See, e.g.*, *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, 793 F. Supp. 3d 19, 98 (D.D.C. 2025).

Rule 23(a)(2) specifies "questions of law or fact" must be "common to the class." FED. R. CIV. P. 23(a)(2). This "commonality" requirement will be satisfied almost as a matter of law when class certification is sought to allow all rightholders to join in the same challenge to the constitutionality, validity, or interpretation of a federal legal provision. *See Refugee & Immigrant Ctr.*, 793 F. Supp. 3d at 99 (holding commonality was satisfied where "[a]ll members of that class . . . faced the same threat of injury," including "loss of the protections afforded to aliens under § 1225(b)(1) (expedited removal) or § 1229(a) (regular removal)"); *Pacito v. Trump*, 796 F. Supp. 3d 692, 698 (W.D. Wash. 2025) (same in challenge to defunding of U.S. Refugee Admissions Program); *Ramirez Ovando v. Noem*, No. 1:25-cv-3183-RBJ, 2025 WL 3293467, at *13 (D. Colo. Nov. 25, 2025) ("All class members, by virtue of being in Colorado without lawful status, are subject to ICE's continued illegal practices.").

Rule 23(a)(3) requires "the claims . . . of the representative parties" must be "typical of the claims . . . of the class." FED. R. CIV. P. 23(a)(3). This "typicality" requirement "tend[s] to merge" with Rule 23(a)(2)'s commonality requirement. *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). When a plaintiff class seeks classwide injunctive relief against a federal legal provision, it is usually easy to find a putative representative who "possess[es] the same interest and suffer[s] the same injury as the class members." *Id.* at 156; *see, e.g. Refugee & Immigrant Ctr.*, 793 F. Supp. 3d at 99 ("Here, the Proclamation and guidance apply equally to—and they affect the legal rights of—all of the members of the proposed, modified class."); *Pacito*, 796 F. Supp. 3d at 699 (holding typicality was satisfied because "[t]he representative plaintiffs and the subclasses they seek to represent advance the same legal claims and arguments, arising from the same events, and seek the same injunctive and declaratory relief").

Finally, Rule 23(a)(4) mandates the class representative must "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). This "adequacy" requirement likewise "'tends to merge' with the commonality and typicality criteria" discussed above. *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). It prohibits "conflicts of interests between named parties and the class they seek to represent" and requires class counsel to be competent. *Id.* at 625-26 & n.20. Courts have held this requirement can be satisfied even when some putative class members supported the challenged policy or provision. *See, e.g.*, *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 781 (9th Cir. 1986). Again,

this requirement should be easily satisfied in most lawsuits for injunctive relief against a particular legal provision. *See, e.g.*, *Refugee & Immigrant Ctr.*, 793 F. Supp. 3d at 102 ("Defendants do not dispute that the proposed class representatives share interests with the members of the class,"); *Pacito*, 796 F. Supp. 3d at 699 ("[T]he representative plaintiffs and the absent class members share a common interest in enjoining the suspension and defunding of USRAP."); *Ramirez Ovando*, 2025 WL 3293467, at *13 ("Plaintiffs adequately represent the class because they share a strong interest in ensuring ICE's compliance with the law.").

Once these requirements are satisfied, Rule 23(b)(2) authorizes certification of a class to seek "injunctive or corresponding declaratory relief" against the underlying legal provision. FED. R. CIV. P. 23(b)(2). "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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (internal quotation marks and citations omitted). A lawsuit for an injunction barring the government from enforcing a challenged legal provision against anyone whose rights are allegedly violated by it will inevitably satisfy Rule 23(b)(2). *See, e.g.*, *Refugee & Immigrant Ctr.*, 793 F. Supp. 3d at 102; *Pacito*, 796 F. Supp. 3d at 702.

Rule 23's requirements can often be imposing in the context of suits for monetary damages. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011).

They do not appear to play a meaningful role, however, in identifying the particular cases in which nationwide class certification is appropriate in the context of suits for injunctive relief against federal legal provisions. Commonality, typicality, and adequacy—which in any event generally "tend[] to merge," *Windsor*, 521 U.S. at 626 n.20; *Falcon*, 457 U.S. at 157 n.13—will usually be satisfied in such suits since all class members would be raising the same claims against the same legal provisions based on the same arguments and seeking the same relief.

B. Rule 23(b)(2) Class Actions May Be Generally Unlikely to Have Preclusive Effect on Absent Class Members

In contrast with most class actions, putative class members in Rule 23(b)(2) cases are not entitled to receive either notice of the case or an opportunity to opt out. *See* FED. R. CIV. P. 23(c)(2)(A) (granting the district court discretion over whether "notice to the class" is required in a Rule 23(b)(2) case); *id.* R. 23(c)(3)(A) (requiring judgments to describe the certified class, with no mention of people who have requested exclusion); *see also Dukes*, 564 U.S. at 363 ("Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory . . . ."). In many cases, it would be impossible for the court to order notice to all putative class members since there would be no feasible way of identifying them, especially to the extent the class included future rightholders.

In general, a person is not bound by judgment in a case "to which he has not been made a party by service of process." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). Accordingly, in a class action suit for damages, due process requires that "an absent class member . . . be provided with an opportunity to remove himself from the class" in order for an adverse judgment to "extinguish[]" his claim. *Id.* at 848 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-08 (1985)). This Court has yet to resolve whether "depriving people of their right to sue in this manner" in a Rule 23(b)(2) class "complies with due process." *Dukes*, 564 U.S. at 363. But it would seem to raise serious due process concerns to allow a single plaintiff in a single district court to unilaterally extinguish the claims of potentially of millions of rightholders throughout the nation without those people even knowing about that lawsuit, having the chance to participate, or being provided the opportunity to opt out, simply because the relief at issue was an injunction or declaratory judgment. *Cf. Richards v. Jefferson Cnty.*, 517 U.S. 793 (1996).

If a Rule 23(b)(2) case in which members of the plaintiff class have not received notice or the opportunity to opt out may not give rise to a res judicata effect for those class members, then Rule 23(b)(2) does not resolve the asymmetric preclusion problem which plagued the universal injunctions at issue in *CASA*. *See* Morley, *De Facto Class Actions?*, *supra* at 531-34. Without mutually binding effect, Rule 23(b)(2) class actions lack the essential characteristic of Bills of Peace which placed them

squarely within the historical tradition of equitable relief. *See CASA*, 145 S. Ct. at 2555.

C. Future Rightholders Pose Challenging Issues for Rule 23(b)(2) Class Actions

Many Rule 23(b)(2) classes (regardless of whether they are nationwide in scope) also pose additional challenges because they include future rightholders: any person who will ever be subject to the challenged legal provision. For example, the class in *CASA* includes "[a]ny child who has been born ***or will be born*** in the United States after February 19, 2025" to certain mothers whose presence in the United States was either unlawful or "lawful but temporary[]." 793 F. Supp. 3d at 728-29 (emphasis added); *see also Barbara*, 790 F. Supp. 3d at 105 (certifying provisional class of "[a]ll current and future persons who are born on or after February 20, 2025" to certain mothers whose presence in the United States was either unlawful or "lawful but temporary[]"); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 23 (2019) [hereinafter, Morley, "*Disaggregating*"] (collecting additional examples unrelated to birthright citizenship).

It is not clear federal courts can enter injunctions protecting, or judgments adjudicating, the rights of such future persons. The class action device is simply a "species" of "traditional joinder" which "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). As with traditional joinder, class certification "leaves the parties' rights and duties intact and the rules of decision unchanged." *Id.*

Indeed, the Rules Enabling Act, which underlies Rule 23, specifically provides federal rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Rule 23(b)(2) class definitions which include future rightholders necessarily encompass class members who lack ripe claims or Article III standing, and indeed who do not yet even exist. Since such litigants would be unable to sue in an individual suit, a federal court likely lacks Article III jurisdiction or equitable power to entertain their claims and grant relief as part of a Rule 23(b)(2) class action. The Court has made this clear in the damages context: "Every class member must have Article III standing in order to recover individual damages. 'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)).

Limiting Rule 23(b)(2) classes to existing persons with justiciable claims, however, can lead to severe administrability problems. Depending on the case, it may be difficult to determine whether a particular person is protected by the judgment. Perhaps more importantly, the judgment would occupy an unsatisfactory middle ground: it would extend beyond the specific named plaintiffs in the case, yet would not definitively resolve the rights of all rightholders in the jurisdiction. To the contrary, as time goes on, an ever-increasing number of new rightholders within that jurisdiction who presumably are not included within the court's judgment will develop.

Stare decisis may be a far more effective tool for protecting third-party non-litigants. When this Court issues a ruling, the existence or scope of any accompanying injunctive relief tends to become irrelevant because its rulings have national *stare decisis* effect. *See Roe v. Wade*, 410 U.S. 113, 166 (1973) ("We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional."), *overruled on other grounds*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). *Stare decisis*—not injunctive relief—is the primary vehicle through which most of this Court's landmark cases, like *Miranda v. Arizona*, 384 U.S. 436 (1966), or *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), protect people's rights.

District court rulings presently lack any stare decisis effect. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011)). One of the main rationales for this rule is that district courts have clogged dockets and must make numerous fact-intensive rulings quickly, sometimes without comprehensive research, and do not want errors to bind other judges. *See* Joseph W. Mead, *Stare Decisis in the Lower Courts*, 12 NEV. L.J. 787, 823-24 (2012). But if a court is willing for its rulings concerning the constitutionality, validity, or interpretation of federal

legal provisions to have nationwide effect through an injunction, it would surely be appropriate for those rulings to have stare decisis effect within that district (or potentially even within the circuit where that district court sits).

Districtwide stare decisis allows third-party non-litigants to receive the protection of favorable district court rulings even before a case makes its way to the Court of Appeals or Supreme Court. At the same time, it does not empower the first district judge to adjudicate an issue to impose his or her view of the law across the entire nation, thereby foreclosing percolation and effectively forcing emergency proceedings in that case. Class certification and injunctions are not the only effective tools in the district court toolbox. *See* Morley, *Disaggregating*, *supra* at 53-56.

II. NATIONWIDE CLASS INJUNCTIONS RAISE MANY OF THE SAME CONCERNS AS THE UNIVERSAL INJUNCTIONS *CASA* REJECTED

Putting aside potential concerns about asymmetric preclusion, *see supra* Section I.B, nationwide class injunctions in Rule 23(b)(2) cases resolve some of the objections to universal defendant-oriented injunctions, but leave other critical concerns unaddressed. For example, plaintiffs in non-class cases involving divisible rights may lack Article III standing to seek relief that goes beyond enjoining the challenged legal provision as to themselves for the benefit of third-party non-litigants who are not involved in the controversy before the court. *See* Morley, *Disaggregating*, *supra* at 28 & n. 148-51

(collecting cases). In contrast, when a court has certified a class of similarly situated rightholders, each of those class members is part of the controversy and has Article III standing to seek relief (subject to the "Future Persons" problem discussed earlier, *see supra* Section I.C). *Cf. Cooper v. Fed. Res. Bank*, 467 U.S. 867, 874 (1984). Moreover, whereas universal injunctions create "de facto class actions" by allowing for effectively classwide relief in non-class cases, *CASA*, 145 S. Ct. at 2555-26; Morley, *De Facto Class Actions?*, *supra* at 490-91, classwide injunctions in Rule 23(b)(2) cases are consistent with that rule.

Allowing district courts to certify nationwide classes for the purpose of issuing nationwide injunctive relief concerning federal legal provisions, however, remains somewhat in tension with the structure of the federal judiciary. Congress established a decentralized, hierarchical judiciary, giving district courts limited geographic jurisdiction. *Cf. Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) ("The Judiciary Act has divided the United States into judicial districts. . . . The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district."). Court of Appeals rulings have binding *stare decisis* effect only within their respective circuits. *See Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488–89 (1900). District court rulings lack any stare decisis effect, even within their districts. *See Camreta*, 563 U.S. at 709 n.7. A nationwide Rule 23(b)(2) class empowers a single district court to enforce its view of the

Constitution—and that of the circuit in which it sits—throughout the entire nation, including in other jurisdictions in which other circuits' precedents would otherwise apply.

Moreover, nationwide Rule 23(b)(2) classes in challenges concerning federal legal provisions, while authorized by *Califano*, are flatly inconsistent with this Court's ruling in *United States v. Mendoza*, 464 U.S. 154 (1984). *Mendoza* held that the Government is not subject to offensive non-mutual collateral estoppel. *Id.* at 162. In other words, the *Mendoza* Court held the Government should not be bound by the first adverse district court ruling on an issue, but rather should be free to re-litigate such questions in other jurisdictions.

Mendoza emphasized that the Government is party to more cases than "even the most litigious private entity." *Id.* at 159. It explained that both the "geographic breadth of Government litigation" as well as the "substantial public importance" of the issues the Government litigates—including crucial "constitutional questions"—counseled strongly in favor of preserving the Government's ability to relitigate such issues. *Id.* at 159-60.

The *Mendoza* Court cautioned that "freezing the first final decision rendered on a particular issue" would "substantially thwart the development of important questions of law." *Id.* at 160. Moreover, this Court would be deprived of the opportunity to assess how various circuits implement differing approaches to a legal provision as separate cases percolate through the judicial system. *See id.* And rather than selecting the best case in which to

adjudicate a particular question once a circuit split has arisen, this Court would effectively be forced into granting certiorari once nationwide relief has issued, even if the underlying facts present a poor or unrepresentative vehicle for resolving the issue. *Id*.; *cf. id*. at 161 ("The application of nonmutual estoppel against the Government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.").

Certification of a nationwide Rule 23(b)(2) class, particularly when followed by a nationwide class injunction against enforcement of a legal provision, appears flatly inconsistent with *Mendoza*'s reasoning. To be sure, *Mendoza* approved application of ***mutual*** collateral estoppel against the Government. *Id*. at 163-64. But the Court explicitly based that proviso on the premise that, even with such preclusion, "the Government is still free to litigate the issue in the future with some other party." *Id*. at 164. With a nationwide class of all present and future rightholders, however, there is no other possible future party against whom the Government can relitigate an issue, since any such hypothetical litigants are already members of the nationwide class. Thus, *Mendoza* suggests this Court should reassess *Califano*'s embrace of nationwide Rule 23(b)(2) classes; at the very least, this Court should address the apparent tension between those cases. *See* Morley, *Rule 23(b)(2)*, *supra* at 623.

Beyond the range of practical issues noted in *Mendoza*, nationwide class injunctions incentive extreme forum shopping to the same extent as

universal injunctions. *Cf.* Samual L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 457-61 (2018); Howard W. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 363-64 (2018). Plaintiffs on either end of the political spectrum can have the rights of people throughout the entire nation adjudicated, at least in the first instance, by ideologically outlier judges who are most likely to be sympathetic to their claims. "Moreover, a district court's factual findings and discretionary judgment calls can influence and even cabin [an] appellate court's conclusions." Morley, *Disaggregating*, *supra* at 32.

Nationwide class injunctions will also contribute to emergency litigation on this Court's so-called "shadow docket" to the same extent as universal injunctions. Both types of orders tend to "transform[] a limited dispute between a small number of parties focused on one feature of a law into a far more consequential referendum on the law's every provision as applied to anyone." *Labrador v. Poe*, 144 S. Ct. 921 (2024) (Gorsuch, J., concurring in grant of stay). With "nationwide stakes," courts are forced to adjudicate politically charged, controversial legal issues "based on expedited briefing and little opportunity for the adversarial testing of evidence." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in grant of stay). Whenever possible, fundamental rights should not hinge on such harried, high-stakes, all-or-nothing politically charged proceedings.

One reasonable alternative would be to modify *Califano* to require district courts to certify circuitwide (or potentially districtwide) classes rather than nationwide classes in cases against government defendants concerning the constitutionality, validity, or interpretation of federal legal provisions. To be sure, this approach does not fully address the range of potential concerns that may be raised against Rule 23(b)(2) classes. *Cf. supra* Part I. But it reflects an attractive compromise between competing compelling interests.

On the one hand, the breadth of circuitwide classes would allow courts to check the political branches of government and protect numerous rightholders effectively. On the other hand, the limits of circuitwide classes would cabin the power of district judges, preserve the Government's ability to re-litigate adverse rulings in other circuits, facilitate percolation among circuits, and reduce the stakes of individual cases. *See* Morley, *Disaggregating*, *supra* at 52-53; *cf.* Morley, *Rule 23(b)(2)*, *supra* at 654-55 (suggesting other potential constraints on certification of Rule 23(b)(2) classes).[2]

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[2] One other possibility would be to limit nationwide injunctive or declaratory relief in Rule 23(b)(2) cases against government defendants to situations where a district court concludes the challenged legal provision violates "clearly established law" based on Supreme Court precedent (which have national *stare decisis* effect). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct . . . 'every reasonable official would [have understood] that what he is doing violates that right' . . . [because] existing precedent [has] placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (quoting *Anderson v.*

CONCLUSION

For these reasons, this Court should refrain from definitively reaffirming the validity of nationwide Rule 23(b)(2) class actions against government defendants at this time. This Court should instead consider empowering lower courts to allow the public to benefit from their rulings in cases against

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Creighton, 483 U.S. 635, 640 (1987)). Federal law establishes other, similarly demanding standards for identifying clear-cut, ostensibly indisputable constitutional violations from which this Court could borrow in this context. *See, e.g.*, *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding a court generally may deny a certificate of appealability to a state prisoner in a habeas case only if "reasonable jurists" would be unable to find "the district court's assessment of the constitutional claims debatable or wrong"); 28 U.S.C. § 2254(d)(1) (authorizing habeas relief for state prisoners only where a state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court").

Limiting nationwide injunctive relief to such extreme cases would enable courts to grant relief against legal provisions which are "patently unconstitutional under settled law." *CASA*, 606 U.S. at 899 (Sotomayor, J., dissenting). It may be challenging—and perhaps inappropriate—for a district court to make this determination at the initial class certification stage, however, since these standards are inextricably intertwined with the merits of the plaintiffs' underlying claims. At the end of a case, this approach might require a district court to decide between either narrowing the scope of a previously certified nationwide class if it determines a particular legal provision does not satisfy this heightened standard for nationwide relief, or instead leaving some members of that class without relief (which would be even more problematic). Any type of merits-related restriction this Court may consider placing on the propriety of nationwide Rule 23(b)(2) classes would likely raise similar issues. Nevertheless, a requirement of this nature could provide meaningful guidance to lower courts concerning the proper scope of Rule 23(b)(2) classes.

government defendants concerning the constitutionality, validity, or interpretation of federal legal provisions by certifying circuitwide classes under Rule 23(b)(2). It should likewise assess whether district courts' rulings in such cases should have *stare decisis* effect within their respective districts.

Respectfully Submitted,

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