No. ______

In the Supreme Court of the United States

PATRICK MORRISEY, ET AL.,

Petitioners,

V.

JONATHAN R., MINOR,
BY NEXT FRIEND SARAH DIXON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents asked a federal court to remake West Virginia's foster-care system. Their forty-seven all-or-nothing demands encompassed every part of that system: caseload ceilings and hiring qualifications for caseworkers; timetables for evaluations, case plans, and permanency plans; a placement-matching process and foster-home recruitment plan; target rates for maltreatment, placement stability, and permanency; an outside entity to run placements; and a monitor above it all. Similarly broad suits are pending across the country—by one count, in thirty-four States.

After certifying two classes covering every child now or ever in the State's custody, the district court dismissed the suit for lack of standing. It held it could not redress Respondents' claims without exercising a power it did not have: the power to take total control of the state system.

A divided Fourth Circuit reversed, announcing that a court "not only holds the power, but a duty, to implement, oversee, and administer reform of state institutions"—even when it becomes "a manager or policy planner." It also refused to review the certification order, holding that Federal Rule of Civil Procedure 23(f) barred review even though the order had merged into the final judgment.

The questions presented are:

1. Is a claim redressable when the only relief said to be effective requires a federal court to become the "manager or policy planner" of a state agency?
2. When a class-certification order merges into a final judgment, does Federal Rule of Civil Procedure 23(f) nonetheless bar an appellate court from reviewing that order on a cross-appeal from the judgment?

PARTIES TO THE PROCEEDING

Petitioners who were defendants in the district court and defendants-appellees in the court of appeals are Patrick Morrisey, in his official capacity as the Governor of West Virginia; Alex J. Mayer, in his official capacity as the Secretary of the West Virginia Department of Human Services; Cammie Chapman, in her official capacity as Deputy Secretary of the Department of Health and Human Resources; Lori Bragg, in her official capacity as Interim Commissioner of the Bureau for Social Services; and the West Virginia Department of Human Services.

Respondents who were plaintiffs in the district court and appellants in the court of appeals are, individually, and on behalf of all others similarly situated, Jonathan R., minor, by next friend, Sarah Dixon; Anastasia M., minor, by next friend, Cheryl Ord; Serena S., minor, by next friend, Sarah Dixon; Theo S., minor, by next friend, L. Scott Briscoe; Garrett M., minor, by next friend, L. Scott Briscoe; Gretchen C., minor, by next friend, Cathy L. Greiner; Dennis R., minor, by next friend, Debbie Stone; Chris K., Calvin K., and Carolina K., minors, by next friend, Katherine Huffman; Karter W., minor, by next friend, L. Scott Briscoe; and Ace L., minor, by next friend, Isabelle Santillion.

STATEMENT OF RELATED PROCEEDINGS

Jonathan R. v. *Justice*, No. 3:19-cv-00710 (S.D.W. Va.), memorandum opinion and order granting defendants' motion to dismiss issued July 28, 2021;

Jonathan R. v. *Justice*, No. 21-1868 (4th Cir.), opinion reversing and remanding for further proceedings issued July 20, 2022.

Justice v. *Jonathan R.*, No. 22-240 (S. Ct.), order denying petition for writ of certiorari issued October 11, 2022.

Jonathan R. v. *Justice*, No. 3:19-cv-00710 (S.D.W. Va.), memorandum opinion and order on plaintiffs' renewed motion for class certification and appointment of class counsel issued August 17, 2023;

Jonathan R. v. *Morrisey*, No. 3:19-cv-00710 (S.D.W. Va.), memorandum opinion and order dismissing case issued February 28, 2025; and

Jonathan R. v. *Morrisey*, No. 25-1232 (4th Cir.), opinion reversing and remanding for further proceedings issued June 4, 2026.

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INTRODUCTION

Whatever else can be said about the decision below, its conception of federal power does not lack confidence. It claims "judicial authority" to "direct the use of state funds" and "enact expansive reforms." App.13a. It embraces a "vision of the federal judge as a 'manager' of institutional reform" of state agencies. App.18a. It proclaims that "[t]he federal judiciary not only holds the power, but a duty, to implement, oversee, and administer reform of state institutions that violate the federal rights of citizens." App.20a. And it dismisses the State's contrary views as mere "public policy concerns." App.27a.

Yet these confidently stated principles defy the separation of powers. Respondents asked a federal district court "to take over the [West Virginia] foster care system during and until it is reformed to their satisfaction." App.63a. Their forty-seven demands would have forced that court to "assume the responsibilities of those who were elected to lead," sweepingly restructuring the state system from top to bottom. App.62a. And though the district court appropriately declined, the Fourth Circuit insisted that the district court could "fashion a comprehensive decree incorporating any and all of these requests." App.27a. A federal trial court can now assume control over the state executive branch's acts of administration, the state legislative branch's acts of appropriation, and the state judicial branch's acts of supervision—all in one decree.

"The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart"—the Constitution. *New York* v. *United States*, 505 U.S. 144, 188 (1992). Our system is meant to "ensure that States function as political entities in their own right." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). The Fourth Circuit's conception of federal judicial power would erase those distinctions, offending "principles of state sovereignty and a federal government of limited and enumerated regulatory powers" on the way to rewriting standing's requirement of redressability. *Landor* v. *La. Dep't of Corr. & Pub. Safety*, 146 S. Ct. 1931, 1947 (2026).

Were that not enough, the divided lower court also refused to consider whether "Rule 23's procedural protections" were respected. *Trump* v. *CASA, Inc.*, 606 U.S. 831, 849 (2025) (cleaned up). Those requirements might have at least narrowed the case from the otherwise total takeover that Respondents' broad claims, sweeping remedies, and class-wide treatment promised. But the district court instead certified classes encompassing all present and future foster-care children in West Virginia in a class-certification order plagued with problems. See App.56a-60a (Rushing, J., dissenting in part). Yet the majority insisted that it could not even take an earnest look at these problems until some later day.

At least outside the Fourth Circuit, it is "a general rule of law [that] federal judges are not allowed to become permanent de facto superintendents of major state agencies." *M.D. by Stukenberg* v. *Abbott*, 119 F.4th 373, 395 (5th Cir. 2024). The Court should grant the petition to ensure that this general rule—and Rule 23, for that matter—remains the law in the Fourth Circuit, too.

OPINIONS BELOW

The Fourth Circuit's opinion (App.1a-60a) is reported at 178 F.4th 139. The district court's opinion (App.61a-84a) is reported at 768 F.Supp.3d 756.

JURISDICTION

The Fourth Circuit entered judgment on June 4, 2026. See App.85a. Petitioners timely filed this petition for certiorari on September 2, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and rules appear at App.89a-104a.

STATEMENT

A. Institutional Reform Litigation Generally.

Plaintiffs in institutional reform litigation aim to transform the structure, policies, or practices of public institutions through aggressive court mandates and judicial oversight. See John Choon Yoo, *Who Measures the Chancellor's Foot?: The Inherent Remedial Authority of Federal Courts*, 84 CALIF. L. REV. 1121, 1124-25 (1996). Unlike traditional lawsuits that resolve discrete disputes between specific parties, these lawsuits "reach beyond the parties involved directly in the suit" with the goal of forcing the "sound and efficient operation of [the public's] institutions." *Heath* v. *De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989); see also Abram Chayes, *The Role of The Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976). The bottom-line objective is to force *political* change, see *id.*, even if achieving it forces courts to "accommodat[e] … a wider constellation of interests than is represented in the adversarial setting of the courtroom," *N.Y. State Ass'n for Retarded Child. Inc.* v. *Carey*, 706 F.2d 956, 969 (2d Cir. 1983) (Friendly, J.).

Cases follow a template. "Reform-minded attorneys identify a program that needs change," they "construct a legal theory that some constitutional or statutory requirement has been violated," and they "file a lawsuit." ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 3 (2003). The suit seeks to produce what has come to be known as a "structural injunction," or, when it follows a settlement (as it most often does), a "consent decree." *Id.* at 4.

A "structural injunction" is "the most visible and perhaps the most ambitious exercise of judicial power"; supporters think it can be used "to reconstruct the world." OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS iv (2d ed. 1984). Through it, "[t]he judge directs the reconstruction of an ongoing bureaucratic organization." Owen M. Fiss, *The New Procedure*, in THE CONSTITUTION AND THE REGULATION OF SOCIETY 129 (Gary C. Bryner & Dennis L. Thompson eds., 1988). A federal judge, unelected and unaccountable to any electorate, thus becomes "a roving commission to do good." Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 960, 971 (1978). And the judiciary has applied this powerful device to all manner of local institutions: prisons, mental hospitals, police forces, schools, child welfare systems, public housing, and more. See *Missouri* v. *Jenkins*, 515 U.S. 70, 126 (1995) (Thomas, J., concurring).

While ambitious, institutional reform litigation often falls short. See SANDLER & SCHOENBROD, *supra*, at 150-51 (discussing how even proponents recognize shortcomings and have turned away from institutional reform litigation). Courts are powerful in declaring rights, but they are less equipped to manage large-scale bureaucracies. See Yoo, *supra*, at 1137-38. They don't have the relevant experience, "possess only imperfect tools for communicating their decrees," have "few resources for guaranteeing compliance," and lack "resources for marshaling political and public support." *Id.;* see generally Note, *Implementation Problems in Institutional Reform Litigation,* 91 HARV. L. REV. 428, 429-32 (1977). Altogether, the "command-and-control" methods courts have available "are not good ones for developing complex programs for bureaucracies that face ever-changing political and social environments, and that have their own bureaucratic characteristics." Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 654 (2004). Unsurprisingly, then, these cases tend to be protracted and costly. See Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation,* 70 VAND. L. REV. 167, 171-72 (2017). And the payoff is small. Near the end of one decades-long case, one of the lawyers now representing Respondents conceded that she didn't even "know what [they] really accomplished." Nina Bernstein, *Despite 20-Year Effort, City Can't Fix System,* NEWSDAY, July 13, 1993.

Today, parties continue to employ these lawsuits "in the[ir] rush to enlist the courts in the cause of social reform"—including in the foster-care context. *Money Store, Inc.* v. *Harriscorp Fin., Inc.*, 885 F.2d 369, 376 (7th Cir. 1989) (Posner, J., concurring). At least thirty-four states have been sued over their foster-care systems alone, with the average case dragging on eleven years. SUMMARY OF CHILD WELFARE CLASS ACTION LITIGATION, CASEY FAM. PROGRAMS (Apr. 15, 2026), https://perma.cc/H7LH-EFX3 (last modified June 22, 2026).

B. This Institutional Reform Case.

This petition involves one such lawsuit. In September 2019, a self-described "watchdog organization that compels change through the power of the courts" filed this action on Respondents' behalf. *Our Mission*, A BETTER CHILDHOOD, https://perma.cc/2GWH-NMX5 (last visited Aug. 31, 2026). Respondents—twelve children then in the custody of West Virginia's Department of Human Services—sued the Governor, the Department, and several other state officials in a class action complaint asking to restructure the foster-care system. See generally C.A.App.148-252.

The Complaint labels West Virginia's program a top-to-bottom "failure[]." C.A.App.153. Respondents allege that the supervising agency is "chronic[ally]" overburdened, understaffed, mismanaged, and underfinanced. C.A.App.150-53. Pairing these claims with alleged "systemic" issues, they maintain that the State's "actions and inactions" put them at a "risk of harm." *E.g.*, C.A.App.159-161. And because of these problems, they claim that Respondents have "violated their constitutional rights in six different ways under the Substantive Due Process Clause" and statutes like the Americans with Disabilities Act and Rehabilitation Act of 1973. App.66a; see also App.57a.

Respondents "insist [these issues] can only be remedied through systematic, structural change" made up of forty-seven indivisible demands. *Jonathan R.* v. *Justice* ("*Jonathan R. I*"), 41 F.4th 316, 323 (4th Cir. 2022); see also C.A.App.246-51. Respondents have termed these remedies "holistic," C.A. Oral Arg. 7:41-7:48, and claimed that they are necessary to address the "innumerable things" that led to the singular risk of harm that Respondents sought to rectify, *id.* 29:11-29:13.

To name a few, Respondents demand:

1. An outside entity to run foster-care placements, including mandatory plan-development timetables;
2. A "complete and thorough" needs evaluation (including disability needs) for every child within 30 days of entering care;
3. An "adequate and individualized" case plan—including reunification and permanency plans—within 60 days of entering care;
4. A plan to recruit more foster and adoptive homes on a mandatory timeline;
5. Caseload limits of 10-12 families and 12-15 children per worker, and a tracking system to monitor those caseloads;
6. Extra hiring qualifications (*e.g.*, social work degree);
7. Specific, timebound caseworker recruitment, retention, training, and tracking requirements and processes;
8. A new placement "matching process";
9. Specific numerical limits on maltreatment, placement-stability, and permanency rates; and
10. A court-appointed monitor to oversee progress.

C.A.App.246-51; see also C.A.App.1416-1444 (Respondents' interrogatory responses further expanding the demands).

Respondents also proposed multiple sprawling classes, including: (1) a general class for "all children who are now, or will be, in the custody of" the Department of Human Services, and (2) a subclass consisting of "children who have or will have physical, intellectual, cognitive, or mental health disabilities." C.A.App.153, 157-58.

C. The Fourth Circuit's Mandates: Round One.

Recognizing that Respondents' broad requests would require the federal court to dictate state judicial proceedings involving abuse-and-neglect matters, Petitioners moved to dismiss. *Jonathan R. I*, 41 F.4th at 323-24. The district court granted the motion on mootness (in that the plaintiffs had exited the foster-care system) and *Younger* abstention grounds. *Id.* at 324 (citing *Younger* v. *Harris*, 401 U.S. 37 (1971)). It observed how "[r]emoving discretion from West Virginia's state courts"—which oversee abuse-and-neglect cases—"and implementing federal court review over these decisions [would be] highly problematic." *Jonathan R.* v. *Justice*, No. 3:19-CV-00710, 2021 WL 3195020, at *13 (S.D.W. Va. July 28, 2021).

The Fourth Circuit reversed. *Jonathan R. I*, 41 F.4th at 328. Relevant here, it reasoned that a federal forum was preferable because it thought state courts were reluctant to order "deep structural changes." *Id.* at 338. The Fourth Circuit was not content to "[r]eform[] foster care case-by-case." *Id.* at 336. Instead, it paved the way for "Plaintiffs [to] assert wide-reaching, intertwined, and 'systemic' failures that cannot be remedied through piecemeal orders." *Id.* "[F]ederal reform of systemic deficiencies in the [state] executive branch" was needed. *Id.* at 339.

On remand, the district court partially granted Petitioners' motion to dismiss, leaving intact the due process claim for the general class and the ADA and Rehabilitation Act claims for the ADA subclass. Order, *Jonathan R.* v. *Justice*, No. 3:19-cv-00710 (S.D.W. Va. Jan. 13, 2023), 2023 WL 184960, at *9, *13, *17.

But more problems soon developed. For one, the original district court judge recused. Order, *Jonathan R.* v. *Justice*, No. 3:19-cv-00710 (S.D.W. Va. Apr. 3, 2023), ECF No. 310. That judge explained that he had "conducted extensive and intensive settlement discussions between the parties." *Id.* at 1. Recognizing that any remedy would require governmental policymaking, the judge had also engaged directly with the West Virginia Legislature to try to resolve Respondents' expansive claims. See Allen Siegler, *Federal Judge Withdraws From West Virginia Foster Care Lawsuit After Involving Lawmakers In Settlement Talks*, MOUNTAIN STATE SPOTLIGHT (Apr. 3, 2023), https://perma.cc/5PBQ-BR2M.

The case was reassigned to a new judge, who then partially granted Respondents' renewed class certification motion. Clerk's Order, *Jonathan R.* v. *Justice*, No. 3:19-cv-00710 (S.D.W. Va. Apr. 3, 2023), ECF No. 311; *Jonathan R.* v. *Justice*, 344 F.R.D. 294, 313-14 (S.D.W. Va. 2023). The district court certified the general class and one ADA subclass. 344 F.R.D. at 313-14. Even so, the district court warned that it "remain[ed] skeptical of any relief requiring it to assume control of a state agency and direct how that agency manages its program and allocates its funds." *Id.* at 301 n.1.

D. The Fourth Circuit's Mandates: Round Two.

The warning proved prescient. In February 2025, after summary judgment motions were fully briefed, the district court dismissed the action for lack of Article III standing. App.61a-84a.

The Constitution, the court explained, does not "confer on federal judges some amorphous power to supervise the operations of government and reimagine them from the ground up." App.65a (cleaned up) (quoting *Whole Woman's Health* v. *Jackson*, 595 U.S. 30, 40 (2021)). "That is the role of the executive and the legislature." App.62a. Respondents' requested structural injunction—by requiring the court to "take over the foster care system during and until it is reformed to [Respondents'] satisfaction"—transgressed those limits. App.63a. So the court could not redress Respondents' alleged injuries. App.66a.

Respondents sought "judicially crafted policies that would, in effect, place West Virginia's foster care system under indefinite federal control." App.64a. An injunction would direct "agency hiring, budget allocations, and caseworker caseloads." App.64a; see also App.70a. The requested monitor, too, would "operate[] her own bureaucracy to replace the state agency for the length of the litigation." App.72a. Practical experience showed that such "[i]ntervention inexcusably exhausts judicial resources, usurps state and local authority, and creates disputes that polarize the judiciary." App.77a. At bottom, "[t]he voluminous record in this case show[ed] that West Virginia's foster care system is a complex administrative system that properly relies on the executive, legislative, and judicial branches of state government." App.82a. "The relief requested" would push these actors aside by "requir[ing] th[e] court to create state policy." App.82a.

Respondents appealed the dismissal and Petitioners conditionally cross-appealed the class-certification order. App.11a. The Fourth Circuit reversed again. App.7a.

First, the Fourth Circuit empowered the district court to serve as the State's "manager or policy planner," equipped to oversee Respondents' large-scale federal intervention. App.18a (cleaned up). It concluded that "the federal judiciary not only holds the power, but a duty, to implement, oversee, and administer reform of state institutions that violate the federal rights of citizens." App.20a. This "comprehensive policy reform" could be targeted at all manner of "state administration." App.21a.

The court sought support in rather recent judicial practices. App.14a. Since the 1950s, courts across the country had purportedly managed failing state institutions by way of structural injunction. App.14a-16a. Modern prevalence—not founding-era history—thus justified total judicial takeovers.

Perhaps sensing the expansiveness of its view, the panel then identified three "guardrails" that it thought would "guarantee" lower courts won't exceed their Article III power. App.24a-25a. The court stressed how district courts should (1) limit remedies to the scope of the violation, (2) consider state and local interests in crafting a remedy, and (3) not let injunctions live on forever. App.24a-26a. In other words, the court thought the district court could clean up Petitioners' Article III concerns on the *back* end of a lawsuit—even though standing is a front-end concern.

Second, even though class certification is a "central" issue for "broad-sweeping policy reforms," a majority declined to entertain Petitioners' conditional cross-appeal. App.56a (Rushing, J., dissenting in part). According to the majority, the reversal on standing "effectively" made the class certification "interlocutory and thus unreviewable" considering "the time restrictions governing such appeals in Federal Rule of Civil Procedure 23(f)." App.41a (majority op.). The majority thus set aside, "mid-opinion," "significant questions about whether [Respondents'] contentions are actually common to every member of these broadly defined classes." App.58a (Rushing, J., dissenting in part).

Concurring in part of the judgment and dissenting from the rest, Judge Rushing explained why the court could have and should have evaluated the class-certification decision: the class-certification order had merged into the judgment. App.51a. But she also reflected on how "two different district court judges in this case now have expressed concerns about their authority to interfere with state institutions as radically as [Respondents] demand." App.48a. "[T]he judges' sense that they were being asked to stray beyond their purview," she stressed, "was legitimate." App.48a.

REASONS FOR GRANTING THE PETITION

I. The Article III Question Warrants Review.

By giving the district court the power to overtake a vast state institution, the Fourth Circuit "transform[ed] the least dangerous branch into the most dangerous one." *Jenkins,* 515 U.S. at 132 (Thomas, J., concurring). In that way, it "has so far departed from the accepted and usual course of judicial proceedings" that it warrants this Court's involvement. SUP. CT. R. 10(a). This Court should intervene to return the judiciary in its appropriate role and preserve federal courts' credibility. "The Constitution affords federal courts considerable power, but it does not establish government by lawsuit." *United States* v. *Texas*, 599 U.S. 670, 704 (2023) (Gorsuch, J., concurring) (cleaned up).

A. Courts lack the equitable power to take over state programs.

Article III standing restrains courts' power on the "front end" of every lawsuit. *Texas*, 599 U.S. at 703-04 (Gorsuch, J., concurring). It is "built on a single basic idea—the idea of separation of powers"—and "prevent[s] the judicial process from being used to usurp the powers of the political branches." *Id.* at 675-76 (cleaned up). It serves to protect federalism, too. "[W]hat the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers." *Jenkins*, 515 U.S. at 133 (Thomas, J., concurring) (cleaned up). Standing thus requires a plaintiff to "clearly allege facts demonstrating" three familiar elements: that she has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338 (2016) (cleaned up). This petition concerns the last.

"Redressability requires that the court be able to afford relief *through the exercise of its power.*" *Haaland* v. *Brackeen*, 599 U.S. 255, 294 (2023) (cleaned up). Where a federal court is powerless to redress an injury, the plaintiff lacks standing. *Texas*, 599 U.S. at 677-78; see also *id.* at 704 (Gorsuch, J., concurring). So, embedded in the redressability analysis is a threshold question: does the court even have the power to remedy the alleged injury? See, *e.g.*, *id.* at 676-78.

Respondents look to enlist federal courts' equitable power. To be sure, courts have equitable power to enter injunctions against state agencies—just not structural injunctions that require courts to run state governments top-to-bottom. The Supreme Court developed structural injunctions in the 1950s and 1960s in response to a constitutional crisis. Yoo, *supra*, at 1130; accord App.14a. It "surrounded its discussion with the aura of tradition"—grounding the structural injunction in "traditional attributes of equity power," recognizing that "equitable principles" must guide lower courts. Yoo, *supra*, at 1131, 1161 (cleaned up).

Yet those "equitable principles" have limits defined by history. *CASA*, 606 U.S. at 846-47; *Texas*, 599 U.S. at 676. While "flexible," "equitable authority is not freewheeling." *CASA*, 606 U.S. at 841. A federal court's ability to entertain suits "in equity" goes only so far as "equitable remedies traditionally accorded by courts of equity at our country's inception." *Id.* (cleaned up). Without a "founding-era" "historical pedigree," a remedy "falls outside the bounds of a federal court's equitable authority." *Id.* at 847.

A full-scale judicial takeover of a state agency and program is "at odds with the history and tradition of the equity power and the Framers' design." *Jenkins*, 515 U.S. at 126 (Thomas, J., concurring). In fact, "the role of the courts in the supervision of public institutions is very largely the product of recent remedial innovation." Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1269 (1983). As one lower court has put it, history shows "it is beyond the power of an Article III court to order, design, supervise, or implement … [a] requested remedial plan … [that] would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Juliana* v. *United States*, 947 F.3d 1159, 1171 (9th Cir. 2020).

1. At the founding, English equity courts had severely limited power. An outgrowth of the Crown, the equity courts entertained only "recognized categories of cases," and "each of these specific actions … called for a specific equitable remedy." *Jenkins*, 515 U.S. at 127 (Thomas, J., concurring). Blackstone—the primary authority for the American colonists in defining equity—"described the English courts of equity as carefully restrained by precedents and rules." Yoo, *supra*, at 1152. He warned that expansive equitable remedies would threaten the rule of law and result in arbitrary government. *Jenkins*, 515 U.S. at 127-28 (Thomas, J., concurring) (citing 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 436 (1768)).

Too, an all-encompassing structural injunction looks "radically different from the injunctions traditionally issued by courts of equity." *Brown* v. *Plata*, 563 U.S. 493, 554 (2011) (Scalia, J., dissenting). Those injunctions "usually required 'a single simple act.'" *Int'l Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 841 (1994) (Scalia, J., concurring) (quoting H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 15 (2d ed. 1948)). In fact, the court of chancery held a "historical prejudice" "against rendering decrees which called for more than a single affirmative act." *Id.* (cleaned up). And after a party complied with an order, "the court did not engage in any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior." *Id.*

2. Against this backdrop, "the Framers approached equity with suspicion." *Jenkins*, 515 U.S. at 128 (Thomas, J., concurring). Thomas Jefferson pointedly described the driving concern: "Relieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it[s] equity, and the whole legal system becomes incertain." 9 PAPERS OF THOMAS JEFFERSON 71 (J. Boyd ed., 1954).

This suspicion permeated the ratification debates. Anti-Federalists sharply criticized the Constitution's grant of judicial power to "Cases, in Law and Equity." Yoo, *supra*, at 1155-1161. They feared that judges might have unfettered discretion to decide cases on feeling, not fact—a fear that the equity power might "be used, as it sometimes is now, in structural reform cases." *Id.* at 1155-56; see *Jenkins*, 515 U.S. at 128-129 (citing 2 THE COMPLETE ANTI–FEDERALIST 322 (H. Storing ed. 1981)). The Federalists agreed and moved to reassure them: equity would be restricted by "rules and precedents" "[t]o avoid … arbitrary discretion." THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *id.* NO. 80, at 479-80 (Alexander Hamilton); Yoo, *supra*, at 1157-58. And Hamilton "described Article III 'equity' as a jurisdiction over certain types of cases rather than as a broad remedial power." *Jenkins*, 515 U.S. at 130 (Thomas, J., concurring).

So the Constitution was "sold" with a very narrow understanding of equitable power. See *Jenkins*, 515 U.S. at 126 (Thomas, J., concurring); see also *Alden* v. *Maine*, 527 U.S. 706, 715-24 (1999).

The idea of a sweeping structural injunction would have been deeply offensive to that principle. Comprehensive structural injunctions push the judiciary outside of the Founders' understanding of courts' rightful lane. Hamilton perceived the judiciary to be "the least dangerous" branch precisely because it could not do what the executive and legislative branches could. THE FEDERALIST NO. 78, at 465-66 (Alexander Hamilton). It "has no influence over either the sword or the purse[,] no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." *Id.* Unlike the executive and legislative branches, the judiciary has "merely judgment" to wield and "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.* And James Madison understood the stakes: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." THE FEDERALIST NO. 47, at 303 (James Madison) (quoting Montesquieu). Thus, "substantial separation of powers barriers [exist] to a suit seeking an injunction to reform administrative procedures." *Allen* v. *Wright*, 468 U.S. 737, 766 (1984).

3. Additionally, the Court has "no precedent for a lawsuit like this." *Texas*, 599 U.S. at 686. Courts have used injunctions to compel specific, discrete tasks, like providing a law library for prisoners or implementing a specific level of staffing in a state-run health facility. At the same time, the Court has steadily limited the *scope* of structural injunctions, with an eye toward federalism and separation of powers. See Parkin, *supra*, at 185-86 (noting that modern precedent embodies a deep skepticism of institutional reform litigation). And the Court has never endorsed the idea that a comprehensive, full-takeover structural injunction is an available equitable remedy at all.

Such an injunction is contrary to what this Court has said about the judiciary's "properly limited" role in "our constitutional system." *Texas*, 599 U.S. at 675-76. As the district court recognized, federal judges don't possess "some amorphous power to supervise the operations of government" and "reimagine" them "from the ground up." *Whole Woman's Health*, 595 U.S. at 40 (cleaned up). "There simply are certain things that courts, in order to remain courts, cannot and should not do." *Jenkins*, 515 U.S. at 132 (Thomas, J., concurring). And "run[ning]" programs that fall within the heartland of state authority is one of them. *Plata*, 563 U.S. at 565 (Alito, J., dissenting). After all, "the judicial power is the power to decide cases for parties, not questions for everyone." *Texas*, 599 U.S. at 694 (Gorsuch, J., concurring) (cleaned up).

This Court's restraints on scope are consistent with that idea. The Court has emphasized "the very limited role that courts should play in the administration of [state] facilities," *Block* v. *Rutherford,* 468 U.S. 576, 584 (1984), and directed lower courts to "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution," *Milliken* v. *Bradley ("Milliken II")*, 433 U.S. 267, 280-81 (1977); see also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983). It has also cautioned that judges must resist the natural "tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination." *Bell* v. *Wolfish*, 441 U.S. 520, 562 (1979). "[P]rinciples of federalism require that state officials with front-line responsibility for administering [a] program be given latitude and substantial discretion." *Frew* v. *Hawkins*, 540 U.S. 431, 442 (2004).

And though the Court has sometimes tolerated intrusive structural injunctions, it has never endorsed one that seizes *every* facet of a state program like the one here. See *Bell*, 441 U.S. at 562 (warning federal courts against becoming "enmeshed in the minutiae of [agency] operations”). The injunction in *Plata*—this Court’s most recent institutional reform case—didn’t go that far. *Plata*, 563 U.S. at 509-10, 530-34. The injunction there ordered one thing: reduce prison populations within two years. *Id.* It left the State “substantial flexibility” and discretion on how to achieve that goal. *Id.* at 532-33.

* * *

History and precedent both reflect a healthy realism that “judges … are human.” *Bell*, 441 U.S. at 562. As humans, they’ll naturally believe that they can fix seemingly imperfect state programs. *Id.* Yet that “temptation” is precisely what prompted the Founders to station Article III at the door, and this Court—time and again—to turn courts back when they overstayed their welcome. *Lewis* v. *Casey*, 518 U.S. 343, 388 (1996) (Thomas, J., concurring).

B. The Fourth Circuit distorted the judiciary’s constitutional role.

The Fourth Circuit “succumb[ed]” to that “great” “temptation.” *Lewis*, 518 U.S. at 388 (Thomas, J.). It overlooked history and tradition, and it misinterpreted this Court’s precedent. In the Fourth Circuit’s view, not only *can* courts commandeer state government, but indeed they *must*. App.7a, 20a. And in doing so, they should act less like a judge and more “like a manager or policy planner.” App.18a (cleaned up); contra *O’Shea* v. *Littleton*, 414 U.S. 488, 501 (1974) (rejecting an injunction that would compel “continuous supervision by the federal court over the conduct of the [state entity] petitioners”).

Applying a methodology the Court rejected just last term, *CASA*, 606 U.S. at 845-46, the Fourth Circuit started in the recent past—skipping over any inquiry into founding-era history. Had the Court started from the beginning, it may have seen the error of its ways. But it instead picked up in 1955, when structural injunctions were born. App.14a. Because it didn't consider *all* the relevant history, App.14a-16a, it had no baseline to know the difference between a practice with a founding-era pedigree and one without.

The Fourth Circuit compounded the problem by mistaking prevalence for precedent. See App.15a-17a. Courts do not gain a power by exercising it often—especially when it comes to jurisdictional limits like standing. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). And equitable power isn't measured by how many courts have exercised it—it's measured by history. *CASA*, 606 U.S. at 846-47.

The Fourth Circuit's approach also inverts Supreme Court precedent. The Court has upheld structural injunctions precisely because lower courts *abstained* from acting as managers, leaving ample discretion to state officials on implementation. *E.g.*, *Plata,* 563 U.S. at 531-33 (finding injunction gave State "substantial flexibility" on how to comply); *Hutto* v. *Finney,* 437 U.S. 678, 688 (1978) (recognizing 30-day limit for compliance "present[ed] little danger of interference with prison administration"); *Milliken II*, 433 U.S. at 291 (noting that the district court's order did not attempt a restructuring). *Plata*—the panel's primary authority—proves the point. *Plata,* 563 U.S. at 531-33. An order that sets an outcome and leaves the State to decide how to reach it is an exercise of judicial power. In contrast, when a court "injected itself by injunctive decree into the internal disciplinary affairs of [a] state agency," that court "departed" from the "principles" governing equitable relief. *Rizzo* v. *Goode*, 423 U.S. 362, 380 (1976).

The Fourth Circuit's "guardrails"—tailoring, sensitivity, and modifiability—are also no help, as they go to *degree*, not *kind*. They come from cases that only considered scope of an *assumedly* available remedy, and they calibrate on the *back end* of a case how much control is proportionate to the violation found. In other words, they go to a different question from the one this case presents—that is, whether taking complete control is an equitable remedy a federal court may exercise *at all*. History answers the *relevant* question by looking to the kind of order sought, not its size relative to the underlying violation. A court of equity's traditional "prejudice … against rendering decrees which called for more than a single affirmative act," *Bagwell*, 512 U.S. at 841 (Scalia, J., concurring) (cleaned up), does not soften just because the affirmative acts are proportionate to the harm.

And in listing its three "guardrails," the panel ignored the ones that truly matter: the separation of powers and federalism principles embedded in Article III. Article III provides the threshold constraints that ask whether power exists *before* any court decides how carefully to wield it. Courts don't make law or policy, or execute either. See *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Just as they don't control other branches of the *federal* government, *TransUnion* v. *Ramirez*, 594 U.S. 413, 423-24 (2021), federal courts don't run state governments, *Whole Woman's Health*, 595 U.S. at 40.

The panel also did not solve any of its problems when it tried to tie its decision to Respondents' request for declaratory relief. App.30a-32a. All roads still lead back to the troublesome injunctive relief, as the majority speculated that a declaratory judgment would—at best—prompt some unidentified suit that would in turn help

Respondents secure their injunctive relief in some unspecified way. App.31a. Yet as Judge Rushing noted, "a judgment's 'possible, indirect benefit in a future lawsuit' does not preserve standing." App.47a n.18 (Rushing, J., dissenting in part) (quoting *United States* v. *Juvenile Male*, 564 U.S. 932, 937 (2011) (per curiam)). "[P]sychic satisfaction is not an acceptable Article III remedy," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998), and a declaration that operates only by prompting an unidentified future suit against unidentified parties is nothing more than that. And anyway, "a declaratory judgment … is the very kind of relief that cannot alone supply jurisdiction otherwise absent." *California* v. *Texas*, 593 U.S. 659, 673 (2021). Even more when the ultimate relief Respondents seek would require the involvement of non-parties—most obviously, the Legislature and its power to appropriate—who would not even be bound by any eventual judgment. *Id.*

Nor can Respondents save their claims by pointing to some lesser injunction. Respondents have never sought partial relief or styled their requests as providing a menu of mere options. They have insisted, repeatedly and by design, that their injury is a single indivisible "risk of harm" produced by "innumerable things" and curable only through "systematic, structural change." *Jonathan R. I*, 41 F.4th at 323; C.A. Oral Arg. 29:11-29:13; App.29a. Courts take a plaintiff's theory of injury as he pleads it—and the injury must "be redressed by the *requested* judicial relief." *FDA* v. *All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (emphasis added). Having defined their injury as one that they say only a wholesale takeover can cure, Respondents cannot now disclaim the takeover to preserve their standing. Even the Fourth Circuit once recognized as much. See *Maryland* v. *USDA*, 151 F.4th 197, 211 (4th Cir. 2025) ("[T]he broad remedy here presents a redressability problem—not because that is what the district court ordered, but because that was the relief that plaintiffs requested in their complaint.").

So the panel's "unambiguous legal reality," App.20a, lacks history, tradition, precedent, and principle. That is the kind of unmoored expansion of judicial power—in contravention of this Court's precedents—that this Court's review exists to address.

C. The Court should answer the question now.

Total takeovers worsen the practical problems with institutional reform litigation—problems that members of this Court have flagged for decades. These cases are growing more frequent and more invasive. The time to address them is now.

1. Structural injunctions that give courts total control "ignore[] bedrock limitations on the power of Article III judges, and take[] federal courts wildly beyond their institutional capacity." *Plata*, 563 U.S. at 550 (Scalia, J., dissenting). They "turn[] judges into long-term administrators of complex social institutions"—making them "indistinguishable from the role ordinarily played by executive officials." *Id.* at 555. They "constrain[]" "democratically-elected officials" "in their ability to fulfill their duties," and similarly "deprive *future* officials of their designated legislative and executive powers." *Horne* v. *Flores*, 557 U.S. 433, 449 (2009) (emphasis added) (cleaned up). And they invite "judges to indulge policy preferences." *Plata*, 563 U.S. at 558 (Scalia, J., dissenting). They do all this without institutional competence or effective tools for enforcement. *Id.*; *Jenkins,* 515 U.S. at 132 (Thomas, J., concurring). The net result is a severe "detract[ion] from the independence and dignity of the federal courts." *Jenkins*, 515 U.S. at 133 (Thomas, J., concurring).

Had the district court issued the injunction here, it would have become an Article III Department of Human Services official. *Plata*, 563 U.S. at 555-58 (Scalia, J., dissenting). The court would have to, among other things, oversee (1) foster placements for 6,118 foster children, (2) the day-to-day work of and training requirements for caseworkers and supervisors, (3) the contents of policies and procedures, (4) the administration of therapeutic services, (5) foster home recruitment efforts across the State, and (6) hiring of personnel. These duties would require the court to continuously engage with budgetary decisions, social services operations, and administrative priorities—all of which are entrusted to state officials. The judge would become entwined with local politics, bureaucratic limitations, and shifting resource constraints for years and possibly decades. State officials would have no real room to exercise their discretion.

An injunction would also hinder, not help, ongoing efforts to improve West Virginia's foster-care system by usurping control. It would impose a shadow bureaucracy, vesting lawyers with veto power over state policy. And if the plaintiffs determine the State's efforts aren't good enough, the Department would be forced to start anew or face a contempt sanction. Court intervention would "sap[] the power and responsibility" of Department officials "by limiting what they can do and by telling them what they must do." SANDLER & SCHOENBROD, *supra*, at 144.

With the court's new responsibilities would come intractable problems that it is ill-suited to solve. The district court is no expert in foster care, childhood trauma and development, the delivery of social services, bureaucratic management structures, training procedures, foster home recruitment, or state budgets. "Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions." *Plata*, 563 U.S. at 558 (Scalia, J., dissenting).

The district court also faces structural limitations that handicap its capacity to implement the plaintiffs' requested relief. Reforming West Virginia's foster-care system requires the opinion and expertise of many, not just the parties here. Yet our adversarial system only lets the litigants speak. When it comes to enforcement, the court has only one option—a contempt proceeding—which is too blunt a punishment to achieve a finely tuned foster-care system.

Perhaps most troubling, an injunction would disrupt State officials' political accountability. West Virginia's "voters [will] lose the ability to communicate with government" and to make their voices heard—to vote out incompetent leaders and reelect effective ones. SANDLER & SCHOENBROD, *supra*, at 157. Unelected outsiders, not local voters and their duly elected representatives, will decide what happens to West Virginia's foster children. See *id.* at 159. And in this way, an injunction, "which is justified by opening up government to those who have been disenfranchised," will "disenfranchis[e] others." *Id.* at 158. But "[t]he political process"—not the courtroom—is "the appropriate forum in which to air policy disagreements." *Seven Cnty. Infrastructure Coal.* v. *Eagle Cnty.*, 605 U.S. 168, 192 (2025).

2. This case isn't an anomaly, either. Comprehensive structural injunctions of this kind are proliferating and expanding. Remember how this all started: institutional-reform decrees in the desegregation cases arose from officials' open defiance of a constitutional command this

Court had itself pronounced, with remedial tools the Court described as extraordinary and triggered only by a school authority's default. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). The Court has since said that those powers were a departure to be wound down, not a template to be extended. *Bd. of Educ. of Okla. City Pub. Schs.* v. *Dowell*, 498 U.S. 237, 247-48 (1991); *Freeman* v. *Pitts*, 503 U.S. 467, 489 (1992); *Jenkins*, 515 U.S. at 88-89. But what began as extraordinary, isolated interventions in the 1950s has metastasized into a standing feature of state governance. CASEY FAM. PROGRAMS, *supra*. Today, dozens of states operate parts of their child welfare systems under continuing federal control, with no end in sight for many.

Since the 1980s, at least thirty-four states have faced a child welfare reform action, a case brought by or on behalf of children in foster care seeking comprehensive system reform. CASEY FAM. PROGRAMS, *supra*. Ten have been defendants in multiple lawsuits. *Id.* At least thirty-four lawsuits remain active in twenty-six states. *Id.*; Decision and Order, *Mary B.* v. *Dompeling*, No. 3:22-cv-00129 (D. Alaska Mar. 31, 2026), ECF No. 461 (entering judgment for the State after trial). Of the active cases, thirteen cases remain pending resolution and twenty-one have an active consent decree or structural injunction in place. CASEY FAM. PROGRAMS, *supra*. Only eleven jurisdictions have successfully exited court oversight in the last ten years. *Id.* On average, these cases last eleven years—longer than the time most children spend in foster care. *Id.* And these types of structural injunctions aren't effective. See generally SANDLER & SCHOENBROD, *supra*, at 150-153 (discussing debate on success of institutional reform decrees). Respondents' counsel recently sued the State of Tennessee claiming its foster-care system was "just as bad, if not worse," than before sixteen years of judicial management. Class Action Compl. at ¶¶ 3-8, *Keira M.* v. *Quin*, No. 3:25-cv-00566 (M.D. Tenn.), ECF No. 1.

3. With child-welfare class actions increasing (and producing little in the way of results), it's "easy to see why" "on multiple occasions, and across administrations," parties have asked the Court "to consider the propriety of" such an expansive equitable remedy. *CASA*, 606 U.S. at 840; see, *e.g.*, Pet. for Cert. at 2-3, *Faust* v. *B.K.*, 589 U.S. 1275 (2020) (No. 19-765); Pet. for Cert. at 3, *Sault Ste. Marie Tribe* v. *Michigan*, 146 S. Ct. 1486 (2026) (No. 25-165). But none of those prior petitions have had such a clean vehicle.

Here, for the first time, the Court has two comprehensive opinions—going in opposite directions—confronting the antecedent question of Article III *power*, not merely the scope of an injunction. And as with universal injunctions, pervasiveness has only sharpened the stakes: "[a]s the number" of these takeovers "has increased, so too has the importance of the issue." *CASA*, 606 U.S. at 840. This Court should take the opportunity and speak now.

II. The Class Certification Question Warrants Review.

Beyond the Article III problem, the Fourth Circuit also deepened a split over when and how appellate courts can review class-certification decisions. And it took a position that will needlessly send cases shuttling back and forth between appellate courts and district courts. The Court should grant the petition to confirm that conditional cross-appeals from class certification can and should be heard when circuit courts reverse a final judgment.

A. The Fourth Circuit ignored the merger rule.

1. Federal law usually allows a party to appeal from only a final judgment. See 28 U.S.C. § 1291. "The general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (cleaned up). "[B]y preventing piecemeal appeals," the rule "promotes the efficient administration of justice and preserves the proper balance between trial and appellate courts." *Geo Grp., Inc.* v. *Menocal*, 607 U.S. 438, 444 (2026) (cleaned up). It "avoid[s] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940).

The merger rule makes the final-judgment principle possible. Once the "district court enters a final judgment in a case, interlocutory orders rendered in the case typically merge with the judgment for purposes of appellate review." *Shannon* v. *Gen. Elec. Co.*, 186 F.3d 186, 192 (2d Cir. 1999) (Sotomayor, J.). So "[d]esignation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment." FED. R. APP. P. 3 advisory committee's note to 2021 amendment. The Federal Rules expressly adopt this concept, explaining that the "notice of appeal encompasses all orders that … merge into the designated judgment or appealable order." FED. R. APP. P. 3.

The merger rule applies seamlessly when the winner takes all—but conditional cross-appeals allow it to work in other circumstances, too. See *Branch* v. *Smith*, 538 U.S. 254, 261 (2003). Often, a prevailing party suffers an early defeat by interlocutory order—like the class-certification here, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978)—that might still warrant review if the prevailing party suddenly becomes the losing one on appeal. Using a cross-appeal can "justify a remedy in favor of an appellee." *Greenlaw* v. *United States*, 554 U.S. 237, 244-45 (2008). So where a party won the war—but lost a battle—he makes the cross-appeal "conditional" on reversal of the judgment.

Beyond conditional cross-appeals or appeals from a final-judgment loss, class actions have another avenue of review: Federal Rule of Civil Procedure 23(f). That rule affords litigants a special opportunity to appeal class certification questions before *any* final judgment. See FED. R. CIV. P. 23(f); FED. R. CIV. P. 23 advisory committee's note to 1998 amendment. Under the provision, a party may "petition" for "permission to appeal" within 14 days of any certification or decertification decision. FED. R. CIV. P. 23(f). The court of appeals then applies its "unfettered discretion" to decide whether to hear the appeal, applying "any consideration" it "finds persuasive." FED. R. CIV. P. 23 advisory committee's note to 1998 amendment.

2. Petitioners did not take Rule 23(f)'s optional shortcut, but they brought a conditional cross-appeal of the class-certification order when they obtained final judgment in their favor. That choice was consistent with the merger and cross-appeal rules. Taking up all the issues at once provides for efficient "ventilat[ion]" of all "district court error[s]" in one go. *Quackenbush*, 517 U.S. at 712 (cleaned up). Indeed, some courts require parties to file conditional cross-appeals to avoid waiver on remand. *Art Midwest Inc.* v. *Atl. Ltd. P'ship XII*, 742 F.3d 206, 211-12 (5th Cir. 2014) (collecting cases). "This widely-accepted rule furthers the important value of procedural efficiency." *Nw. Ind. Tel. Co., Inc.* v. *FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (cleaned up). In contrast, decoupling these decisions produces the piecemeal appellate practice Congress intended to avoid.

The majority showed no concern for the procedural efficiency of the cross-appeal. It instead held that reversal required it to unmerge the class-certification decision from the final judgment—leaving appellate review for another day. Petitioners must now proceed—absent this Court's review—to a class-wide trial in the face of "extensive problems with the district court's [certification] order." App.56a (Rushing, J., dissenting in part). This outcome "turns [courts' usual] approach to conditional cross-appeals on its head," App.51a, creating delay and waste from a rule expressly designed to avoid both. And the majority's choice to take this approach all on its own, without any suggestion from either party, is still more reason to reverse. See *Margolin* v. *Nat'l Ass'n of Immigr. Judges*, 146 S. Ct. 1285, 1288 (2026) (summarily reversing "the Fourth Circuit for violating this party-presentation principle"); *Clark* v. *Sweeney*, 607 U.S. 7, 8 (2025) (same).

What's more, the majority's decision ignores how appeals after final judgment are taken as a matter of right. Rule 3—titled "Appeal as of Right—How Taken"—does not distinguish between a direct appeal and a cross-appeal. See generally FED. R. APP. P. 3. Both start the same way—by filing a notice of appeal with the district clerk. FED. R. APP. P. 3(a)(1). Because "[t]he notice of appeal encompasses all orders that … merge into the designated judgment," FED. R. APP. P. 3(c)(4), cross-appeals—conditional or not—are taken as a matter of right. And courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat)

264, 404 (1821). These principles explain why the Fourth Circuit has previously said that it "*must* consider … conditional cross-appeals." *Bank of Montreal* v. *Signet Bank*, 193 F.3d 818, 826 (4th Cir. 1999) (emphasis added).

While the majority invoked Rule 23(f), its decision conflicts with that rule, too. Rule 23(f) was adopted to "expan[d]"—not displace—"opportunities to appeal" class-certification decisions. FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment. It was necessary because "[a]n order denying certification may confront the plaintiff with a situation in which … an individual claim … is far smaller than the costs of litigation." *Id.* On the other hand, "[a]n order granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Id.* Weighty class-certification decisions thus dictate how—and if—a claim is litigated.

Nothing in Rule 23(f) bars appellate courts from reviewing conditional cross-appeals challenging class-certification orders. "Final-judgment appeals remain available to review a grant or denial of class certification on appeal from a final judgment that disposes of the entire action, merging in the judgment in the way that many other interlocutory orders merge in a final judgment." 15B WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3914.19 (3d ed. 2026). If anything, the Rule's appellate review expansion suggests courts should be *more* eager to take up merged class-certification orders when properly presented in a conditional cross-appeal. Rule 23(f) is discretionary review, earlier on, on a faster schedule. Thus, reading it to displace review of a final judgment guts the procedural efficiency the Rules promote.

B. The decision deepens a circuit split over class-certification review.

The majority below isn't alone, but its decision crystallizes a split. The majority leaned on decisions from the Ninth and Sixth Circuits. It ignored the Seventh and D.C. Circuits, which went the other way.

Start with the mistaken side of the split: the Ninth and Sixth Circuits.

The majority here principally relied on the Ninth Circuit's decision in *Blake* v. *City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979). There, the Ninth Circuit decided it wouldn't be "appropriate … to decide appellees' cross-appeal challenging the class certification order" because it "remand[ed] the case for further proceedings" and "the class certification order may be modified." *Id.* at 1386. Even *Blake* might take a less extreme approach than the Fourth Circuit did. Indeed, in some intra-circuit inconsistency, later cases have hinted that the court might have discretion to review certification on a cross-appeal in the right circumstances. See, *e.g.*, *Klawonn* v. *Bd. of Dirs. for the Motion Picture Indus. Pension Plans*, No. 25-2874, 2026 WL 2364541, at *1 (9th Cir. Aug. 14, 2026) (considering conditional cross-appeal of class certification); *Vizcaino* v. *U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 717-18 (9th Cir.), amended by 184 F.3d 1070 (9th Cir. 1999) (explaining that the proper method to challenge class certification when a defendant prevails on the merits is to conditionally cross-appeal). But *Blake*'s rule is a break from the merger doctrine all the same.

The Sixth Circuit has adopted a nondiscretionary version of the rule: reversal unmerges interlocutory orders from the final judgment in every case. In *Milan*

Express Company v. *Western Surety Company*, the court reasoned that, because it "reverse[d] the judgment of the district court dismissing plaintiffs' case …, there [was] no longer a final judgment to support [its] review of interlocutory orders, even though such a judgment existed at the outset of the appeal." 886 F.2d 783, 785 n.1 (6th Cir. 1989) (cleaned up). So, the court concluded that its "reversal of the judgment below prevent[ed it] from reviewing the district courts' denial of class certification." *Id.*

In contrast, the D.C. and Seventh Circuits will decide appeals of merged class-certification orders.

In *Fink* v. *National Savings and Trust Company*, the D.C. Circuit reversed a summary judgment order. 772 F.2d 951, 953 (D.C. Cir. 1985). Without raising any doubts from the decision's interlocutory nature, the court proceeded to review and remand the district court's denial of class certification. *Id.* at 960-61; see also *Hartman* v. *Duffey*, 19 F.3d 1459, 1466 (D.C. Cir. 1994) ("[T]he fact that the USIA was the prevailing party on the merits … would not have precluded it from challenging class certification on conditional cross-appeal.").

The Seventh Circuit likewise reversed a summary judgment order and then resolved a conditional cross-appeal from an order certifying a class. *Council 31, Am. Fed'n of State, Cnty. & Mun. Emps.* v. *Ward*, 978 F.2d 373, 380 (7th Cir. 1992). The court concluded that its reversal made the cross-appellant "adversely affected by the district court's order[] certifying the class," thereby "invigorating the cross-appeal and supporting [the court's] jurisdiction." *Id.* And after Rule 23(f)'s adoption, the Seventh Circuit stayed the course. The court has acknowledged that an appellee can still "challenge the district court's class certification decision" through a cross-appeal following reversal. *Henry* v. *Hulett*, 969 F.3d 769, 787 (7th Cir. 2020).

The D.C. and Seventh Circuits have it right: class-certification decisions merge into final judgments, and a court of appeals must consider them when properly presented. As the D.C. Circuit explained, "the traditional values militating against piecemeal appeals [are] not … served by declining to review the class certification back at the beginning." *Hartman*, 19 F.3d at 1467. Rule 23(f) changes nothing. It is permissive, addressed to a window before any judgment, and says nothing about review after one. Yet the decision below reads that discretionary shortcut as a bar—and in doing so sends a certified class of every child who will ever enter West Virginia's custody to a potential class-wide trial. This Court should grant review, resolve the conflict, and foreclose that outcome.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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