The Class Appeal

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For a wide variety of claims against the government, the federal courthouse doors are closed to all but those brought by powerful, organized interests. This is because hundreds of laws—colloquially known as "channeling statutes"—require disaffected groups to contest government bodies directly in appellate courts that hear cases individually. In theory, these laws promise quick, consistent, and authoritative legal decisions in appellate courts. In fact, without class actions, government bodies avoid judicial review by selectively avoiding claims brought by some of the most vulnerable people in the administrative state—from veterans and immigrants to coal miners, laborers, and the disabled.

This Article proposes a novel solution: courts of appeals should hear class actions themselves. In so doing, courts high in the judicial hierarchy would continue to authoritatively decide important legal questions involving government institutions while ensuring groups of similar, unrepresented parties finally get their day in court. While appellate class actions might sound like a strange procedural innovation, appellate courts already have the power to do this. Relying on the All Writs Act, appellate courts long ago created ad hoc procedures modeled after class actions to respond to systemic government harm.

This Article is the first to examine nascent experiments with appellate class actions. It shows that, contrary to popular belief, appellate courts can hear class actions, and it explains why they should do so. In cases challenging systemic abuse, this power has become vital not only to level the playing field between the government and the governed but also to protect courts' core functions in our separation of powers—to hear claims, interpret law, and grant meaningful relief. Without class-wide judgments in such cases, courts risk ceding power to the executive branch to decide for itself when judicial decisions limit its own unlawful policies.

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INTRODUCTION

For a wide variety of claims against the government, the federal courthouse doors are closed. This is because hundreds of laws—colloquially known as "channeling statutes"—require that disaffected groups contest government bodies directly in appellate courts that traditionally hear cases one at a time.[1] This system may adequately serve private organizations that have the resources, experts, and counsel to challenge the government in the nation's second-highest courts. But for diffuse groups of poor and unrepresented claimants, appellate courts lack critical tools that class actions offer to say what the law is.[2] Consider the following examples:

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[1] *See* Appendix A (Federal Statutes Channeling Review Directly into Appellate Courts) [hereinafter "Appendix A"]. I owe a great debt to the Administrative Conference of the United States (ACUS), from which I obtained the material for the 183 laws included in this appendix. ACUS's Sourcebook of all Federal Judicial Review Statutes was published in June 2022. Cataloging every federal review statute, it identifies over six hundred laws designating different federal district courts, appellate courts, and other specialized courts that review government actions. *See* JONATHAN R. SIEGEL, THE ACUS SOURCEBOOK OF FED. JUD. REV. STATUTES (2022).

[2] Reformers specifically designed the modern class action to facilitate judicial review of unlawful government action for this reason. *See* David Marcus, *Flawed but Noble:*

- For decades, veteran groups challenged benefit programs beset by systemic, multiyear delays.[3] But because veterans had to file their cases in an appellate court that did not hear class actions, the Department of Veterans Affairs (VA) persistently avoided judicial review. The government often strategically resolved petitions just before their hearing dates, ignoring the systemic problems alleged and forcing courts to dismiss cases as moot.[4]
- After sixty thousand children crossed the U.S.-Mexico border in fiscal year 2014, attorneys brought a class action in federal district court against the Department of Justice arguing that the children should receive counsel in immigration hearings.[5] But because a law transferred those immigration cases directly to federal appellate courts without class certification,[6] each child had to go it alone in adversarial immigration proceedings before any court heard their same right-to-counsel claim. When those children could not individually navigate what the court itself called a "labyrinthine maze" of immigration rules,[7] the government deported thousands of them without taking

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Desegregation Litigation and Its Implications for the Modern Class Action, 63 FLA. L. REV. 657, 702 (2011) ("The only recorded conversations to have shaped [Rule 23(b)(2) of the Federal Rules of Civil Procedure] involved concerns about desegregation litigation."); *see also* Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1, 5 (2018) (noting that the drafters of Rule 23 thought that effective class action procedure was critical for achieving school desegregation and pursuing other civil rights causes).

3 *See, e.g.*, Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1026 (9th Cir. 2012) (arguing that multiyear veteran-benefit delays violate due process).

4 Appellate judges in the Federal Circuit and the Court of Appeals for Veterans Claims have repeatedly criticized this practice. *See* Monk v. Shulkin, 855 F.3d 1312, 1321 (Fed. Cir. 2017) (collecting cases and observing that "[c]ase law is replete with such examples"); *see also* Young v. Shinseki, 25 Vet. App. 201, 215 (2012) (Lance, J., dissenting) (noting that a Westlaw search "produces 54 results" for "dismissals [that] were almost exclusively based upon mootness because the Secretary responded to the petition [for extraordinary relief] by remedying the problem without requiring a Court order").

5 J.E.F.M. v. Lynch, 837 F.3d 1026, 1029–30, 1039 (9th Cir. 2016) (citing WILLIAM KANDEL, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2016)); *see also* Liz Robbins, *Immigration Crisis Shifts from Border to Courts*, N.Y. TIMES (Aug. 23, 2015), https://perma.cc/MXQ9-ARNP.

6 *See* Aguilar v. U.S. Immigr. & Customs Div. of Dep't. of Homeland Sec., 510 F.3d 1, 9 (1st Cir. 2007) (describing the "vise-like" grip appellate courts had on virtually all claims tied to immigration removal proceedings); I.N.S. v. St. Cyr, 533 U.S. 289, 313 & n.37 (2001) (explaining the law's purpose "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals"); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1984–85 (2000).

7 *J.E.F.M.*, 837 F.3d at 1040 (McKeown, J., concurring).

steps to preserve their rights on appeal.[8] Many children simply disappeared. The court would never again hear the children's constitutional claims.[9]

- When the Treasury Department fired a group of men for failing to register for the draft, the group filed a class action in district court under the Equal Protection Clause.[10] The Supreme Court rejected their complaint, ruling that they had to file their claims directly in an appellate court.[11] The Court acknowledged the problems appellate courts would face resolving systemic challenges based on a lone petitioner's government record.[12] But the Court found that a plain reading of the statute required the group to individually file their claims in appellate court anyway.[13]

Had these cases proceeded as class actions, the result would have been decidedly different. The government could not have selectively picked off systemic claims pursued on behalf of a class of veterans.[14] Class counsel could have identified unrepresented children and ensured that they received the benefits of the court's decisions.[15] The court could have relied on a common record to review similar legal claims of gender discrimination.[16] Nevertheless, in each case, courts felt obligated to dismiss such claims,

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8 EXEC. OFF. FOR IMMIGR. REV., UNACCOMPANIED ALIEN CHILD (UAC) IN ABSENTIA REMOVAL ORDERS (2022) (showing that the government deported thousands of unrepresented children in absentia).

9 C.J.L.G. v. Barr, 923 F.3d 622, 630 (9th Cir. 2019) (Paez, J., concurring) (criticizing courts' failure to hear claims because "[s]uch cases are extremely difficult to bring" and noting that "thousands of unrepresented children have been ordered removed").

10 Elgin v. United States, 697 F. Supp. 2d 187, 189 (D. Mass. 2010).

11 Elgin v. Dep't of Treasury, 567 U.S. 1, 23 (2012).

12 *Id.* at 19 (suggesting that the court could take judicial notice of facts for an Equal Protection Claim or, if not possible, remand to the agency for additional fact-finding).

13 *Id.* at 11–12.

14 *Compare* Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (holding that the government cannot moot claims by class members by only resolving the lead plaintiff's claim), *with* Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (noting that the government can moot such claims in the absence of a class action).

15 *Cf.* Ms. L. v. U.S. Immigr. & Customs Enf't ("ICE"), 310 F. Supp. 3d 1133, 1139–45 (S.D. Cal. 2018) (finding circumstances warranted a class-wide injunction because the government was "not affirmatively reuniting parents" with children).

16 *Compare* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 359 (1977) (finding that class-wide evidence of pattern-and-practice can be used in class actions to shift the burden of proof to the employer), *with* Celestine v. Petroleos de Venezuela SA, 266 F.3d 343, 355–56 (5th Cir. 2001) (limiting evidence of pattern-and-practice claims outside of class actions), *and* Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1106–08 (10th Cir. 2001) (holding that the district court should not have decertified plaintiffs' class because of the pattern-and-practice nature of their claims).

citing laws that required parties to directly petition federal appellate courts, which lack formal rules to hear class actions.[17]

This wasn't always the case. Even when a statute appeared to call for direct appellate review, courts once allowed class actions against government agencies in trial courts.[18] But this is now rare.[19] Today, courts strictly follow these so-called channeling

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[17] *See, e.g.*, *J.E.F.M.*, 837 F.3d at 1031–33 (rejecting class action in federal district court because of exclusive appellate court review of immigration removal proceedings); *Veterans for Common Sense*, 678 F.3d at 1028, 1032 (rejecting class action in federal district court because of the veteran court's exclusive appellate court jurisdiction over veterans' benefits decisions); Elgin v. U.S. Dep't of Treasury, 641 F.3d 6, 12–13 (1st Cir. 2011) (rejecting a putative class for gender discrimination and unlawful bill of attainder claims). Just before this Article went to press, the Supreme Court decided *Garland v. Aleman Gonzales*, 142 S. Ct. 2057 (2022) which held that a provision of the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), prevents courts (other than the Supreme Court) from granting class-wide injunctive relief under certain provisions covered by that statute. *See Aleman Gonzales,* 142 S. Ct at 2065 (holding that class-wide injunctions requiring bond hearings for detained immigrants violated § 1252(f) because "they require officials to take actions [under a covered provision] that (in the Government's view) are not required"). It is possible that certain classes for injunctive relief for appointed counsel claims could be similarly understood to be barred under the INA. *See* 8 U.S.C. § 1229a(b)(4) (requiring that attorneys be available "at no expense to the government"). However, this is far from clear, and *Aleman Gonzales* expressly leaves open the possibility that parties can still seek declaratory relief as a class. 142 S. Ct. at 2065 n.2; *see also, e.g.*, Nielsen v. Preap, 139 S. Ct. 954, 962 (2019) (holding that courts have jurisdiction to hear claims for declaratory relief notwithstanding § 1252(f)); Jennings v. Rodriguez, 138 S. Ct. 830, 875 (Breyer, J., dissenting) (concluding that declaratory relief class actions remain available notwithstanding § 1252(f)); Alli v. Decker, 650 F.3d 1007, 1015 (3d. Cir. 2011) ("The distinct purpose and effect of a [class-wide] declaration, as compared to an injunction, presents an entirely plausible basis upon which Congress might choose to bar one form of relief but not the other."). Finally, *Aleman Gonzales* does not say whether § 1252(f) prevents federal appellate courts from granting relief under the All Writs Act to review legal or constitutional questions under a different statutory provision, § 1252(a)(2)(D), when immigration courts unreasonably delay or refuse to adjudicate a class of claims at all.

[18] *See, e.g.*, McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 494 (1991) (permitting class action in district court on due process questions that were deemed collateral to the statutory scheme channeling review of immigration decisions); Reno v. Cath. Soc. Servs., Inc., 509 U.S. 43, 56 (1993) (holding that the channeling statute did not preclude district court jurisdiction over the legality of the regulation); Linquist v. Bowen, 813 F.2d 884, 887 (8th Cir. 1987) (permitting a class action challenge in district court).

[19] Even in 1989, a survey for the ACUS found that exclusive appellate review broadly encompassed delay cases, constitutional challenges for "bias and prejudgment," "procedural challenges," "challenges to an agency's authority," as well as "arbitrary and capricious challenges." Thomas O. Sargentich, *The Jurisdiction of Federal Courts in Administrative Cases: Developments*, 41 ADMIN. L. REV. 201, 213–14 (1989) (observing that the "already considerable body of [ ] caselaw" was "continually expanding."); *see also* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 27 (2020) (collecting cases finding that tests used to determine when district courts hear such questions "tend to exclude those alleging systemic inaccuracy in adjudicator decisionmaking"). Notably, the Supreme Court agreed to hear appeals of two cases for its 2022 term that could cut back on this

statutes so long as Congress's intent is just "fairly discernible" from the face of the law.[20]

The rationale for this is straightforward. Congress should be able to choose which lower courts review what the government does, so long as that review is "meaningful."[21] To that end, direct appellate review is supposed to promote government accountability, curb gamesmanship and forum-shopping by litigants, and reduce uncertainty.[22] Especially for large government bodies operating across the country, appellate courts offer the ability to quickly, consistently, and authoritatively decide the law without a duplicative layer of review in trial courts.[23]

Nevertheless, barriers to class actions have obstructed judicial review over scores of government agencies that perform "mass adjudication"—where agencies use large numbers of adjudicators and officers to hear thousands of unrepresented claimants—including those that decide millions of asylum applications, veterans' benefit cases, federal personnel questions, pension determinations, as well as black lung and other disability benefits

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trend: *Cochran v. SEC* and *Axon Entertainment, Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021). In both cases, the Court will consider whether district courts should be able to hear broad constitutional challenges to an administrative scheme, notwithstanding laws that ordinarily channel review into federal appellate courts. SEC v. Cochran, No. 21-1239, 2022 WL 1528373, at *1 (2022); Axon Enter., Inc. v. FTC, 142 S. Ct. 895 (2022).

[20] *See Elgin*, 567 U.S. at 14–15 (rejecting class action in district court because the "integrated scheme of review" in appellate court was designed to reduce "inconsistent decisionmaking," "duplicative judicial review," and "parallel litigation" in multiple venues based upon how litigants characterize their claims); *see also* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207–09 (1994) (finding that it was "fairly discernible" that Congress wanted courts of appeals to exclusively review agency challenges under the Federal Mine Safety and Health Amendments Act); Jarkesy v. SEC, 803 F.3d 9, 16–17 (D.C. Cir. 2015) (holding that the district court lacked jurisdiction to hear procedural and separation-of-powers challenges to SEC hearings under a channeling statute).

[21] *Elgin*, 567 U.S. at 15; *see also Thunder Basin Coal Co.*, 510 U.S. at 215 & n.20.

[22] *See* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 12–16 (1975); ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 75-3: THE CHOICE OF FORUM FOR JUD. REV. OF ADMIN. ACTION (1975), https://perma.cc/AGM6-YBWK [hereinafter "ACUS, Recommendation 75-3"].

[23] Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 78 (D.C. Cir. 1984) ("Appellate courts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise."); *see also* Robert L. Chiesa, Frank A. Kaufman, Robert M. Landis, A. Leo Levin, James E. Noland, Maurice Rosenberg, Mary M. Schroeder, Robert S. Thompson & Daniel J. Meador, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*, 125 F.R.D. 523, 539 (1989) (describing the "principal benefit" of channeling as a way to promote "nationwide uniformity in a program administered by a single, national agency").

cases every year.[24] Because of their heavy case loads, agencies administering these government programs are more prone to mishandle records, misinterpret precedent, lose track of petitioners, and suffer from chronic delays as they hear large numbers of individual cases without lawyers.[25] Worse yet, as I've argued elsewhere, very few federal agencies hear class actions themselves.[26] Without the ability to commence class actions at *any* level of adjudication, many system-wide government problems never reach the federal appellate courts that are supposed to review them.

This Article argues that when federal appellate courts directly review large government programs, they should be able to hear class actions themselves. In such cases, appellate courts could hear class-wide claims for injunctive relief that roughly track the basic elements of Rule 23 of the Federal Rules of Civil Procedure. If necessary, appellate courts could conduct fact-finding through the use of special masters[27] or limited remands to agencies or district courts[28] or the exercise of their equitable

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[24] *J.E.F.M.*, 837 F.3d at 1032–33 (rejecting class action in federal district court because of exclusive appellate court review of immigration removal proceedings); *see also* Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1084–87, 1093 (D.C. Cir. 1992) (rejecting class action in federal district court because of exclusive federal appellate jurisdiction over the Railroad Retirement Board); Arch Coal, Inc. v. Acosta, 888 F.3d 493, 499–500 (D.C. Cir. 2018) (noting the exclusive appellate court review of the Black Lung Benefit Program).

[25] *See, e.g.*, VA OFF. OF INSPECTOR GEN., VETERANS BENEFITS ADMIN.: REVIEW OF CLAIMS-RELATED DOCUMENTS PENDING DESTRUCTION AT VA REGIONAL OFFICES 3 (2016) (describing poor document retention related to veterans' claims); U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN.—OFF. OF AUDIT, EFFECT OF OALJ STAFFING LEVELS ON THE BLACK LUNG CASE BACKLOG 2–3 (2017) (finding that the average Department of Labor adjudication of black lung benefits took 640 days). The D.C. Circuit has described the hurdles to challenging the Railroad Retirement Board. *See Johnson*, 969 F.2d at 1093 ("If a railroad spouse . . . has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts. . . . [But i]f exhaustion overtakes him and he falls somewhere along the road . . . the resulting termination stand[s].").

[26] Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2035–36 (2012) [hereinafter *The Agency Class Action*]; Michael D. Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1641–42 (2017). Of the agency adjudication systems reviewed directly by appellate courts, only the Merit Systems Protection Board hears class actions.

[27] FED. R. APP. P. 48 (allowing courts of appeals to "appoint a special master to hold hearings"); *see also Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 78 (approving use of special masters to resolve factual disputes where appellate courts have exclusive jurisdiction over government entities).

[28] *See* 28 U.S.C. § 2347(b)(3) (2012) (authorizing transfer from courts of appeals to district courts for the purpose of fact-finding in limited situations); *see also* Gallo-Alvarez v. Ashcroft, 266 F.3d 1123, 1129–30 (9th Cir. 2001) (transferring immigration petition for review to district court "for further development of the record"); FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 469 (1984) (recommending remands to district courts and

jurisdiction.[29] In so doing, courts high in the judicial hierarchy would continue to authoritatively decide big legal questions involving government institutions, while ensuring that groups of similar, unrepresented claimants finally get their day in court.

As it happens, appellate courts can *already* do this. This is because of a longstanding gap-filling statute known as the All Writs Act.[30] Although the All Writs Act is "an extraordinary remedy,"[31] it is designed precisely for important, recurring legal questions likely to evade judicial review.[32] It permits "all courts established by Act of Congress" to issue writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[33] Relying on the All Writs Act, courts have developed procedures to respond to systemic violations of law committed by agencies or lower courts, including "representative actions" modeled after modern class action rules.[34]

This Article is the first to examine nascent experiments with appellate class actions and argue for their expansion. In so doing, it offers practical and theoretical lessons for how courts ensure equal access to review our political institutions. On a practical level, appellate classes permit parties, who often lack access to counsel, to pool information and resources to challenge government problems.[35] Appellate class actions also permit courts to hear important questions that often evade their review, while effectuating faithful compliance with their orders.[36] Exploring the

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agencies to develop records when statutes channel judicial review directly to appellate court).

29 Harris v. Nelson, 394 U.S. 286, 300 (1969) (noting that the court could compel interrogatories under the All Writs Act, even where no express rule for discovery was available, to "provide the necessary facilities and procedures for an adequate inquiry").

30 Pub. L. No. 117-102, 36 Stat. 1156, 1162 (1911) (codified at 28 U.S.C. § 1651).

31 Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

32 *See In re* Google LLC, 949 F.3d 1338, 1343 (Fed Cir. 2020) (concluding that a writ was appropriate to address a "fundamental and recurring issue" in patent law); United States v. Pleau, 680 F.3d 1, 4 (1st Cir. 2012) (noting that a writ was appropriate to address recurring issues "of substantial public importance"); Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

33 28 U.S.C. § 1651(a).

34 *See, e.g.*, *Monk*, 855 F.3d at 1319 (allowing the aggregation of veteran mandamus petitions under the All Writs Act); United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1125 (2d Cir. 1974) (aggregating habeas petitions using the All Writs Act).

35 *The Agency Class Action*, *supra* note 26, at 2023–24 (observing that adjudication based on precedent and stare decisis requires lawyers to "find relevant precedents, interpret their significance to the case at hand, and advocate how they should be applied"); 2 NEWBERG ON CLASS ACTIONS § 4:35 (5th ed. 2021) (collecting cases).

36 *See, e.g.*, Almendares v. Palmer, 222 F.R.D. 324, 334 (N.D. Ohio 2004) (certifying a class challenge when it is "not clear that any injunctive relief awarded to an individual

practical benefits of appellate classes is particularly timely. At the time of this writing, over twenty appellate class actions have been filed and—in November 2020—one federal appellate court announced new rules to hear class actions against the Department of Veterans Affairs.[37] Those rules were modeled after several recent appellate class actions the court had heard under the All Writs Act, including an erstwhile $6.5 billion lawsuit that for a time stood as the largest government class action in modern history.[38]

But beyond their practical value, appellate classes raise novel questions about how judges can and should exercise power over facts, the coordinate branches of government, and procedural rules designed to limit their authority. When appellate courts certify class actions, they risk upsetting the balance of power between themselves and the fact-finding tribunals they review. They also place the legality of the government's nationwide programs in the hands of a single regional appellate court.[39] And they may avoid formal processes that courts traditionally use to make rules openly and fairly.[40] This Article argues, however, that

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plaintiff will automatically inure to the benefit of the class as a whole"); Reynolds v. Giuliani, 118 F. Supp. 2d 352, 391–92 (S.D.N.Y. 2000) (certifying a Rule 23(b)(2) class challenge to food-stamp administration because the case "involve[d] a fluid class where the claims of the named plaintiffs may become moot" and "defendants ha[d] the ability to moot the claims of the named plaintiffs, thereby evading judicial review of their conduct").

37 *See* U.S. VET. APP. R. 22; U.S. VET. APP. R. 23.

38 *Monk*, 855 F.3d at 1321; Wolfe v. Wilkie, 32 Vet. App. 1, 34 (2019), *rev'd sub nom.* Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022). The *Wolfe* class involves over seventy-seven thousand veterans wrongfully denied emergency room benefits. Compensation may nearly double the federal government's previously record-setting $3.4 billion Cobell settlement, which resolved claims by Native Americans against the United States after the Department of Interior mismanaged funds that were held in trust. *Compare* Courtney Kube, Mosheh Gains & Adiel Kaplan, *Court Rules VA Must Pay for Veterans' Emergency Care, A Decision that May Be Worth Billions*, NBC NEWS (Sept. 10, 2019), https://perma.cc/5S6C-AQ3L, *with* U.S. DEP'T OF INTERIOR, CONSULTATIONS ON COBELL TRUST LAND CONSOLIDATION, https://perma.cc/335V-UABU. As this Article was going to press, the Federal Circuit held that the *Wolfe* class was not entitled to the relief it sought because the parties could have obtained the same relief through the traditional appellate process and not through a writ of mandamus. *McDonough*, 28 F.4th at 1360. In so doing, the Federal Circuit broke with other federal appellate courts' readings of the All Writs Act. Those courts have used mandamus to resolve recurring questions, thereby avoiding delays, "the potential for massive future litigation," Am. Trucking Ass'n v. ICC, 669 F.2d 957, 961 (5th Cir. 1982), and high-volume adjudication. *See infra* Part II.A.

39 Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 729 (1989) (offering a limited defense of executive power to resist regional appellate courts).

40 Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1687 (2017)

appellate courts can adopt class actions consistent with the judiciary's historic role in reviewing agency action.

This Article proceeds in three parts. Part I explains the problems appellate courts face when they have exclusive review over unlawful government actions. Canvassing almost two hundred channeling statutes, Part I shows how Congress often assigns courts to review the government without accounting for group challenges to executive action. It then details how, without class actions, government agencies avoid judicial review by selectively mooting claims, forcing unrepresented parties to surmount overwhelming administrative backlogs and denying courts critical information needed to craft meaningful relief.

Part II describes how appellate courts have used the All Writs Act to fashion new procedures in aid of their jurisdiction, including class action rules. Relying on the All Writs Act, appellate courts long ago developed rules to review systemic government misconduct—most notably in the context of "habeas class actions"—without a specific rule to do so. Recently, a federal appellate court that directly reviews one of the nation's largest mass adjudication programs, which is administered by the Department of Veterans Affairs, began entertaining class actions in systemic government challenges under the All Writs Act. That court's power under the All Writs Act is no different from any other federal appellate court that directly reviews government challenges.[41] And its recent experience using that power highlights how other appellate courts can develop factual records, resolve large numbers of cases, and offer more effective relief through class actions without overburdening their dockets.

Part III examines what appellate class actions mean for traditional limits on fact-finding, procedural experimentation, and separation of powers. Appellate courts usually make "aggregate" decisions not through class actions but through their power to issue binding, precedential opinions—incrementally adopting rules that apply to common claims from case to case. Precedential decision-making ordinarily respects the traditional boundaries of appellate jurisdiction and separation of powers by allowing political

("[J]udicial intervention has been generally more controversial than development through the formal rulemaking process.").

41 Cox v. West, 149 F.3d 1360, 1363 (Fed. Cir. 1998) ("By its express terms, the [All Writs Act] unambiguously applies to 'all courts established by Act of Congress.' The Court of Veterans Appeals is such a court." (quoting 28 U.S.C. § 1651)).

branches to create uniform national programs and test their legality in different regional appellate courts.

If they do so cautiously, however, appellate courts can adopt class procedures consistent with the judiciary's role in reviewing agency action, its place in our governmental framework, and the boundaries of its procedural authority. First, courts acting in an appellate capacity have historically considered new facts to determine whether government officials acted unlawfully.[42] Moreover, procedural experiments may be particularly justified when policymakers cannot anticipate or design procedural rules without insights from case-by-case adjudication.[43] Finally, appellate class procedures may promote better interactions between the judicial and executive branches, allowing courts to review recurring problems and avoid piecemeal remedies that frustrate the operation of a national bureaucracy.[44]

In sum, in cases of systemic government misconduct, appellate courts may need to flexibly aggregate claims to protect their own status in our system of checks and balances—ensuring that they hear parties' claims, expound legal rules, and craft meaningful relief for unrepresented people facing off against big government bureaucracies. Without a class-wide judgment in such cases, courts risk ceding power to the executive branch to decide for itself which judicial decisions limit the government's own unlawful policies.

I. THE PERILS OF APPELLATE REVIEW OF SYSTEMIC GOVERNMENT MISCONDUCT

Over the last century, Congress has passed hundreds of laws that determine which courts review what the government does.[45] But, as set out in Part I.A, Congress rarely takes into account the problems an appellate court may have reviewing systemic issues raised by a large group of people against a government organization.

The result, as set forth in Part I.B, is a significant problem for appellate courts that directly review government bureaucracies serving many people without lawyers. Without a class action

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42 *See infra* Part III.A.

43 Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9, 15 (1942) (observing that if Congress had to itemize every permissible judicial procedure and remedy, it would "stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest"); *see also infra* Part III.C.

44 *See infra* Part III.B.

45 *See* Appendix A.

rule, appellate courts may not be able to meaningfully review what the government does, provide coherent relief, or ensure that the executive branch complies with their decisions.

A. Congress's Haphazard Approach to Judicial Review by District and Appellate Courts

For almost 150 years, Congress has vested federal district courts with original jurisdiction over cases that arise under federal law.[46] But, for almost as long, Congress has also passed laws that establish which government actions courts can review, as well as which courts can review them.[47] Under the Administrative Procedure Act,[48] Congress can bar judicial review of an agency's decisions by passing laws that expressly prevent courts from reviewing certain issues.[49] Congress may also choose whether a trial or appellate court conducts judicial review.[50]

As a general rule, Congress has more freedom to choose which courts review government actions than whether courts can do so at all. Laws that completely bar judicial review raise "serious constitutional question[s]" because they explicitly limit judicial power to review executive actions that affect individual rights.[51] But so long as *some* court can "meaningfully" review what the government does, Congress can flexibly write laws

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46 28 U.S.C. § 1331.

47 *See, e.g.*, Federal Trade Commission Act of 1914, Pub. L. No. 63-203, ch. 311, 38 Stat. 717, 720 (1914) ("The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive."). Other contemporaneous laws also channeled disputes into three-judge courts with various procedural powers. *See, e.g.*, Hepburn Act of 1906, Pub. L. No. 59-337, ch. 3591, 34 Stat. 584, 592 (1906) (conferring jurisdiction on courts to "enjoin, set aside, annul, or suspend any order or requirement of the [Interstate Commerce Commission]"); Mann-Elkins Act of 1910, Pub. L. No. 61-218, ch. 309, 36 Stat. 539, 539 (1910) (creating a special Article III circuit court to review the Interstate Commerce Commission).

48 Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

49 5 U.S.C. § 701(a)(1). *But see* Abbott Lab'ys v. Gardner, 387 U.S. 136, 141 (1967) (preserving judicial review under the APA absent "clear and convincing" evidence of a "contrary legislative intent").

50 5 U.S.C. § 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter.").

51 Bowen v. Acad. of Fam. Physicians, 476 U.S. 667, 681, 681 n.12 (1986); *see also* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1378–79 (1953). For recent accounts questioning this assumption, see Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1825 (2020) and Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

requiring that parties sue the government in federal district courts, appellate courts, or both.[52]

Using that power, Congress has enacted almost two hundred statutes covering more than fifty different federal agencies that channel review directly into federal appellate courts. These statutes cover agencies that hear a small number of high stakes cases, like billion-dollar patent disputes filed in the Patent Trial and Appeal Board.[53] But they also cover a wide variety of federal bodies that hear many smaller-dollar cases without lawyers—like the Department of Veterans Affairs, Department of Justice, and Department of Labor, which hear hundreds of thousands of veterans, immigration, and federal benefit cases each year.[54] The agencies that are subject to the largest numbers of channeling statutes are a diverse mix that resolve big and little cases: the Department of Agriculture (21), Department of Transportation (19), Environmental Protection Agency (17), Department of Labor (13), Department of Health and Human Services (13), Department of Justice (9), Department of Housing and Urban Development (9), Security and Exchange Commission (7) and Department of Veterans Affairs (5).[55]

Unfortunately, Congress frequently chooses who decides—district courts or appellate courts—without much consideration of their comparative strengths, weaknesses, and procedural rules. Sometimes the selection of a court for review of a government agency may almost be an afterthought of Congress—a by-product of a governmental reorganization or new official assignment within an agency. In 1973, for example, courts of appeals began directly reviewing the Black Lung Benefits Program, a mass adjudication system that was established to compensate an

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[52] *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 & n.20 (1994); Johnson v. Robison, 415 U.S. 361, 366–67 (1974); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have *some* court decide whether an erroneous rule of law was applied." (emphasis added)); *see also* Jarkesy v. SEC, 803 F.3d 9, 15 (D.C. Cir. 2015) ("If a special statutory review scheme exists [in the federal appellate courts] . . . 'it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review.'" (quoting City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979))).

[53] 35 U.S.C. § 141; Matthew Bultman, *Fed. Circ. Tosses VirnetX's $600M Award in Apple Patent Fight*, LAW306 (Nov. 22, 2019), https://perma.cc/ZGA7-HU73.

[54] *See, e.g.*, 38 U.S.C. § 7252 (providing for exclusive review of veterans benefits in the Court of Appeals for Veterans Claims); 33 U.S.C. § 921(c) (providing for exclusive appellate review of federal longshoreman benefits, black lung benefits, and other federal benefit programs); 8 U.S.C. § 1252(a)(5), (b)(9) (providing for exclusive appellate review over removal proceedings).

[55] *See* Appendix A.

estimated five hundred thousand coal miners with lung disease.[56] But the reason had little to do with whether black lung claims raised unique legal questions for appellate review.[57] Rather, Congress had simply moved the Black Lung Benefits Program from the Social Security Administration (whose decisions are reviewed by district courts) to the Department of Labor (whose compensation schemes are reviewed by courts of appeals).[58]

In other cases, channeling can create piecemeal review in both district and appellate courts.[59] For example, in some circuits, *procedural* due process challenges to the "No-Fly List," are heard by district courts that review lawsuits against the Terrorist Screening Center, a government body that makes rules for who can board commercial aircrafts.[60] But *substantive* due process challenges to the No-Fly List are exclusively reviewed by appellate courts.[61]

These problems are not new. For over fifty years, judges and commentators have chastised Congress's haphazard approach to selecting which courts will review unlawful government actions.[62]

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56 30 U.S.C. §§ 924, 931–932; Daniel N. Price, *Black Lung Benefits Revision*, 45 SOC. SEC. BULL. 26 (1982).

57 In fact, given the volume of black lung cases, at the time, contemporaneous observers feared that the unexplained shift to federal appellate courts would "prove to be a source of serious, if temporary, docket pressures for the courts of appeals a year or two from now, and that it bears close watching." Currie & Goodman, *supra* note 22, at 39.

58 Even so, a substantial portion of early black lung claims still remained with the Social Security Administration after that. Price, *supra* note 56, at 26 (observing that between 1970 and 1982, 82% of the $12 billion had been paid by the SSA). That meant that review by district courts and appellate courts for virtually the same kind of challenges to the Black Lung Benefits Program would turn on whether claims were filed before or after July 1973.

59 Loan Syndications & Trading Ass'n v. SEC, 818 F.3d 716, 719 (D.C. Cir. 2016) (observing that "the U.S. Code is littered 'with thousands of compromises dividing initial review of agency decisions between district and circuit courts'" (quoting Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court To Review the Executive*, 67 ADMIN. L. REV. 1, 2 (2015))).

60 See, e.g., Latif v. Holder, 28 F. Supp. 3d 1134, 1141–43 (D. Or. 2014).

61 Kashem v. Barr, 941 F.3d 358, 391–92 (9th Cir. 2019) (finding that the 2015 amendments to the No-Fly List required direct appellate review and dismissing a substantive due process claim). This is because Congress amended the law in 2015 to require that a separate agency, the Transportation Safety Administration (TSA), decide who is on the list. TSA programs have long been exclusively reviewed by appellate courts. *See* 49 U.S.C. § 46110 (stating that "a person disclosing a substantial interest in an order issued by . . . the Administrator of the Transportation Security Administration" must file a petition for review in the D.C. Circuit or the Court of Appeals where the petitioner resides).

62 *See, e.g.*, Currie & Goodman, *supra* note 22, at 5; HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 176 (1973); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 420–22 (1965) (observing unclear language in many special-review statutes as a result of poor legislative oversight); Note, *Jurisdiction to Review*

After all, district and appellate courts occupy very different roles in the federal judicial hierarchy, with different procedural rules governing how they find facts, join parties and claims, and decide binding questions of law.

In 1975, Professors David Currie and Frank Goodman exhaustively studied channeling statutes for the Administrative Conference of the United States, a federal body that studies how other federal agencies work.[63] Their recommendations, endorsed by the federal government, encouraged legislators to account for trial and appellate courts' different positions when Congress passed laws providing for judicial review.[64] They argued that appellate courts were best suited to review administrative questions that presented substantial legal issues, given appellate courts' power to issue precedential decisions that bind large regions of the country.[65]

Their theory was that direct review by an appellate court could save parties from delay and confusion by offering a quicker path to a binding precedential decision.[66] Government agencies already produce a voluminous record by offering "trial type" hearings. So, appellate courts often would not need district courts to play the same role.[67] For that reason, Currie and Goodman argued that direct review by appellate courts provided a more direct, coherent form of judicial oversight, except in cases where the district courts needed to develop facts or provide another layer of review to reduce appellate caseloads.[68] Appellate courts, they

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Federal Administrative Action: District Court or Court of Appeals, 88 HARV. L. REV. 980, 984 (1975) ("[I]n many cases there appears to be no purpose served by the limited language of a special review statute, and the language appears most likely to have resulted only from legislative oversight.").

63 Currie & Goodman, *supra* note 22, at 3.

64 ACUS, Recommendation 75-3, *supra* note 22, at 2–4.

65 *See id.* at 2 ("The courts of appeals, burdened by rapidly increasing caseloads that threaten the quality of their decisions, constitute a scarce resource that should be reserved, to the extent possible, for the resolution of issues of law or policy issues of major impact.").

66 Currie & Goodman, *supra* note 22, at 6 ("Assuming appeal as of right from district to appellate court, bypassing the trial court significantly expedites ultimate decision, lessening the burden on both courts and litigants."); *see also* Note, *supra* note 62, at 983 ("These statutes may also be designed to expedite the implementation of an agency's program by reducing the delays associated with judicial review.").

67 Currie & Goodman, *supra* note 22, at 5 ("The key point is that the district court is unnecessary here because the functions it ordinarily performs in the judicial system are either performed by the administrative agency itself or are relatively unimportant.").

68 *Id.* at 17–19; ACUS, Recommendation 75-3, *supra* note 22, at 2–3:

concluded, offered "superior decision-making" for reviewing large government programs because of their power to "develop and maintain a uniform and coherent case law" across the country.[69]

In some cases, Congress requires direct review for precisely these reasons. Congress may want to streamline litigation into a more experienced appellate court capable of announcing binding precedent. The Administrative Orders Review Act,[70] which sends many agency challenges directly into appellate courts, was primarily designed to avoid "the making of two records, one before the agency and one before the court, and thus going over the same ground twice."[71] The same is true for another program, the U.S. Railroad Retirement Board, which has paid nearly $12.7 billion in retirement-survivor benefits to about 540,000 beneficiaries.[72] When Congress shifted review from district to appellate courts, it hoped to avoid the "further expense" of additional appeals and to provide final and "careful consideration . . . in the circuit court of appeals."[73] Today, courts often cite these very considerations—claimant convenience, streamlined review, and appellate expertise—to require that parties directly challenge government agencies in appellate courts.[74]

This kind of approach may be sensible in areas of administrative law where lawyers represent sophisticated businesses that could challenge agencies that ignored appellate precedent.

> The district court should not be interposed unless the administrative action to be reviewed is of a type: (a) that rarely involves issues of law or of broad social or economic impact warranting routine review by a multimember court, and (b) such that district court review would significantly reduce the workload of the appellate courts.

69 Currie & Goodman, *supra* note 22, at 12.

70 Pub. Law No. 81-901, ch. 1189, 64 Stat. 1129 (codified at 28 U.S.C. § 2342).

71 H.R. REP. NO. 2122, at 4 (1950). The same was true for earlier variants of such bills. Some early channeling laws assigned direct review to appellate courts, while others assigned review to three-judge district court panels, with direct review by the Supreme Court. *Compare* Federal Trade Commission Act of 1914, 38 Stat. 717, 720 (1914) (establishing exclusive jurisdiction in appellate courts), *with* Urgent Deficiencies Act of 1913, 38 Stat. 208, 220 (1913) (establishing specialized three-judge district courts).

72 U.S. R.R. RET. BENEFITS BD., AN AGENCY OVERVIEW (2019), https://perma.cc/Y7B6-87SU?type=image.

73 Hearings on H.R. 1362 Before the House Comm. On Interstate and Foreign Commerce, 79th Cong., 1st Sess., pt. 3, at 1084–85 (1946).

74 *See, e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1, 14 (2012); Telecomms. Rsch. And Action Ctr., 750 F.2d 70, 78 (D.C. Cir. 1984) ("Appellate courts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise. In addition, exclusive jurisdiction eliminates duplicative and potentially conflicting review.").

Indeed, plaintiffs using many early channeling laws were often large, powerful organizations, like monopolies,[75] media companies,[76] investment firms,[77] and state government bodies.[78] But commentators have long missed the unique problems facing systemwide challenges to government practices that impact diffuse groups of unrepresented people. As explained below, this is a particular problem in "high volume" adjudication programs—veteran benefits, immigration, federal workers compensation, and employment programs—that together involve millions of cases a year. In these fields, appellate courts cannot protect large groups of unrepresented people from systemic government dysfunction or misconduct without tools to aggregate them.[79]

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75 The Clayton Antitrust Act of 1914, Pub. L. No. 63-312, 38 Stat. 730 (1914) (codified in scattered sections of U.S.C.), directed into appellate courts challenges to cease-and-desist orders by the Federal Trade Commission, Surface Transportation Board, Federal Communications Commission, Department of Transportation, and the Federal Reserve. *See* 15 U.S.C. § 21.

76 The Administrative Orders Review Act, discussed above, sent many early radio and television challenges to Federal Communications Commission (FCC) into federal appellate courts. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a); *see also* Jason N. Sigalos, *The Other Hobbs Act: An Old Leviathan in the Modern Administrative State*, 54 GA. L. REV. 1095, 1108 (2020) (noting that when the Hobbs Act was written the FCC covered "two areas: (1) issuing licenses to radio stations and (2) regulating communications common carriers").

77 The Securities Exchange Act of 1934, 78 U.S.C. §§ 78a–78qq, the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1–80b-21, and the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1–80a-64, all contain similarly worded provisions for exclusive appellate review. *See* 15 U.S.C. § 77i(a) (Securities Act); § 80b–13(a) (Advisers Act); § 80a–42(a) (Company Act); *see also* Appendix A.

78 Federal appellate courts directly hear many preemption, funding, and territorial challenges by state government. *See* 49 U.S.C. § 31141(f) (reviewing the Transportation Secretary's decisions related to preemption of state laws and regulations); 31 U.S.C. § 6717 (covering challenges to suspension of federal payments to states by the Treasury Secretary); 16 U.S.C. § 160a–1 (covering challenges to decisions by the Department of Interior to revert land from states to the United States).

79 To be sure, other commentators have recognized the limits of appellate precedent in responding to systemic problems in mass adjudication. *See, e.g.*, Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1120–21 (2018); Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 87–88 (2016) [hereinafter *Referral*]; Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1587–90 (2014). For example, Professor Christopher Walker observes that appellate courts can obtain concessions at oral argument, retain jurisdiction, or use other tools to "communicate to the agency specific—and oftentimes even systemic—problems identified by the reviewing court." *Referral*, *supra*, at 89–90. Professors Jonah Gelbach and David Marcus argue that repeat oversight and pressure by courts can accomplish similar goals. Gelbach & Marcus, *supra*, at 1148. My recommendation that courts of appeals consider the use of class actions under the All Writs Act expands upon those kinds of procedural innovations.

B. The Limits of Individualized Appellate Review

One principal reason for direct appellate review, discussed above, is to ensure that appellate courts retain the power to perform their core function—to "develop and maintain a uniform and coherent case law" in government litigation.[80] But, as I discuss in this Section, appellate courts often cannot do that in lawsuits challenging systemic government misconduct without class actions. First, appellate courts may not be able to review unlawful administrative policies that become moot or frustrate parties' ability to appeal at all. Second, without a class, parties often lack access to counsel, resources, and formal procedures to ensure that the agency follows appellate court precedent. Third, courts may lack information about how to structure relief for an unlawful government practice that impacts large groups of people when they hear cases one at a time. This Section concludes by showing how, in this way, class actions are consistent with what Congress wants when it sends challenges to government actions directly into appellate courts.

1. Inherently temporary or frustrated appeals.

Some government policies or practices are inherently transitory or compromise a petitioner's ability to obtain judicial review at all. These include systems that shackle parties before trial, impose excessive fees or bonds, deny lawyers timely access to records, or unreasonably delay the docketing of internal appeals inside an administrative agency.[81] When those claims proceed individually, they often disappear before they ever reach a

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80 Currie & Goodman, *supra* note 22, at 12.

81 *See, e.g.*, De Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 277 F.R.D. 572, 574 (N.D. Cal. 2011) (using a civil class action to challenge an Immigration and Customs Enforcement policy of shackling all detainees in San Francisco's immigration court); VA OFF. OF INSPECTOR GEN., VETERANS BENEFITS ADMINISTRATION: REVIEW OF CLAIMS-RELATED DOCUMENTS PENDING DESTRUCTION AT VA REGIONAL OFFICES. 3 (2016) (describing poor document retention related to veterans' claims); U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN.—OFF. OF AUDIT, EFFECT OF OALJ STAFFING LEVELS ON THE BLACK LUNG CASE BACKLOG 2–3 (2017) (finding that Department of Labor adjudication of black lung benefits took an average of 640 days); Michael D. Shear & Katie Benner, *In New Effort to Deter Migrants, Barr Withholds Bail to Asylum Seekers*, N.Y. TIMES (Apr. 16, 2019), https://perma.cc/X5ZN-VD4R (describing a new policy to keep thousands of asylum applicants in jail indefinitely without bond in a "significant step to discourage migrants from seeking asylum" in immigration hearings).

judicial forum.[82] Those same unlawful practices may also prevent parties from obtaining legal access to challenge them.

Some government agencies, for example, may selectively pick off meritorious claims before courts can issue a decision. For years, individual veterans challenging system-wide problems in the Department of Veterans Affairs' benefit system could not obtain judicial review in response to mandamus petitions in appellate court. As one court observed, a "great majority of the time" the Secretary would simply respond to a petition for mandamus "by correcting the problem within the short time allotted for a response, and the petition [would be] dismissed as moot."[83] As a result, of the more than one thousand petitions seeking mandamus in the court of appeals in the VA between fiscal years 2015 and 2017, the court managed to review only 40% and granted just one per year.[84]

Other unlawful policies may practically prevent parties from ever reaching an appellate court. In immigration removal proceedings, for example, the Department of Homeland Security might unlawfully enter default decisions (known as "in absentia orders") against unaccompanied minor children without lawyers when they fail to show up for their asylum hearings.[85] But no process exists for challenging the immigration courts' *systemic policy* of entering default judgments and illegally ordering the deportation of children without providing them opportunities to find

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[82] *See, e.g.*, United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540 (2018) (finding an individual challenge to pretrial shackling moot following the petitioner's release).

[83] Monk v. Shulkin, 855 F.3d 1312, 1321 (Fed. Cir. 2017) ("Case law is replete with such examples." (quotation marks omitted)); *see also* Dotson v. McDonald, No. 16-2813, 2016 WL 5335437, at *1 (Vet. App. Sept. 23, 2016) (dismissing as moot a petition for a writ of mandamus compelling the VA to adjudicate an appeal because the VA adjudicated the appeal seven days after the petition was filed); Dalpiaz v. McDonald, No. 16-2602, 2016 WL 4702423, at *1 (Vet. App. Sept. 8, 2016) (dismissing as moot a petition for a writ of mandamus compelling the VA to adjudicate an appeal because the VA adjudicated the appeal at an unspecified time within about a month of the petition's filing).

[84] ANNUAL REPORT, U.S. CT. OF APP. FOR VETERANS CLAIMS: OCT. 1, 2016 TO SEPT. 30, 2017 (FISCAL YEAR 2017) 1–2 (2018); ANNUAL REPORT, U.S. CT. OF APP. FOR VETERANS CLAIMS: OCT. 1, 2015 TO SEPT. 30, 2016 (FISCAL YEAR 2016) 1–2 (2017); ANNUAL REPORT, U.S. CT. OF APP. FOR VETERANS CLAIMS: OCT. 1, 2014 TO SEPT. 30, 2015 (FISCAL YEAR 2015) 1–2 (2016).

[85] *See, e.g.*, Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1161–63 (9th Cir. 2004) (finding that the Immigration and Naturalization Service's failure to give proper notice to children's guardians violated due process, particularly when it might have resulted in a deportation order in absentia).

lawyers. Children with lawyers lack standing.[86] Children without lawyers are deported.[87]

Courts adopted class actions to overcome these concerns. In a class action, the class representative can assert claims on behalf of parties where "joinder of all [class] members [is] impracticable,"[88] including in cases involving deported children, veterans with PTSD, mentally disabled adults, or other vulnerable groups unable to assert rights on their own. Class actions can continue even after the lead plaintiff's individual claim becomes moot so long as members of the class continue to have a live controversy.[89] This is true regardless of the reason—whether the plaintiff is released, retains counsel, or simply ages out of a government program.[90]

To be sure, some legal doctrines allow courts to review claims against the government that repeatedly avoid review.[91] And the fact that some cases become moot is not always bad. Doctrines like mootness allow courts to avoid deciding abstract, far-ranging constitutional questions.[92] One court has described the potential

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86 C.J.L.G. v Barr, 923 F.3d 622, 630 (9th Cir. 2019) (Paez, J., concurring) ("The majority states that because [the child] now has counsel, we need not address his argument that appointed counsel is constitutionally required for indigent children in removal proceedings.").

87 *Id.* (observing that "[s]uch cases are extremely difficult to bring" and that after the only other such case settled, "thousands of unrepresented children have been ordered removed").

88 *Monk*, 855 F.3d at 1319.

89 U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980); Sosna v. Iowa, 419 U.S. 393, 401–02 (1975); *Monk*, 855 F.3d at 1319, 1321 (observing that a "claim aggregation procedure" avoids mootness and thus "may help the [court of appeals] achieve the goal of reviewing the VA's delay in adjudicating appeals").

90 *See, e.g.*, Clay v. Pelle, No. 10-CV-01840, 2011 WL 843920, at *7 (D. Colo. Mar. 8, 2011); Mental Disability L. Clinic v. Hogan, No. CV-06-6320, 2008 WL 4104460, at *21 (E.D.N.Y. Aug. 29, 2008).

91 *See* Turner v. Rogers, 564 U.S. 431, 439–40 (2011) (holding that plaintiff's claim was not moot, despite plaintiff completing his prison sentence, because the dispute was "'capable of repetition' while 'evading review'" (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)); Honig v. Doe, 484 U.S. 305, 318–22 (1988) (holding the same for plaintiffs who either aged out of the Education of the Handicapped Act or were not currently facing the disciplinary procedures at issue in the case). *But see* DeFunis v. Odegaard, 416 U.S. 312, 318–20 (1974) (holding that plaintiff's challenge of state law school admissions procedure was moot because future applicants might have subsequently challenged the procedure, and therefore the issue was not likely to evade review).

92 *See* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 n.11 (1980) ("[O]ne of the principal reasons to await the termination of agency proceedings is 'to obviate all occasion for judicial review.'" (quoting McGee v. United States, 402 U.S. 479, 484 (1971))); c*f.* Deaver v. Seymour, 822 F.2d 66, 70–71 (D.C. Cir. 1987) (holding that a collateral civil challenge of the constitutionality of an intendent counsel's authority was impermissible in part to avoid review of "far-ranging and troubling constitutional" questions); Ashwander

for mootness as "a *feature* . . ., not a bug" of some channeling statutes.[93]

Nevertheless, in many cases, appellate courts may still need class actions to address systemic government challenges. First, doctrines that allow courts to review questions that repeatedly evade review only apply in "exceptional situations."[94] Without a class action, it is not enough for a petitioner to show that the same government practice repeatedly impacts *other* people; they must show that their *own* claim will repeatedly avoid review.[95] Second, in many cases, appellate courts cannot review cases they are supposed to review without a way to join people that cannot otherwise practically be found. Without a class, unrepresented claimants with the same complaint may botch filing requirements, miss deadlines, or fail to preserve their rights for appeal.[96] Finally, when enough people suffer from a common practice to qualify for a class action, mooting one claim simply does not solve the problem raised by a systemic unlawful practice. In those cases, the possibility of a future claim is not a general, abstract issue, but remains a live, contested question for hundreds or thousands of others. [97]

2. Informality, delays, and obstacles to legal representation.

Without a class action, parties also lose access to counsel, resources, and procedures that ensure that the agency observes appellate precedent. Some mass tribunals conduct hundreds of

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v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.").

93 Jarkesy v. SEC, 803 F.3d 9, 27 (D.C. Cir. 2015) (emphasis in original).

94 Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

95 *Sanchez-Gomez*, 138 S. Ct. at 1538–42 (holding that an unlawful shackling claim was moot outside of a class action because plaintiff would not be subject to practice again without committing a crime).

96 *See, e.g.*, Wolfe v. Wilkie, 32 Vet. App. 1, 12 (2019) ("Who knows how many veterans relied on such a [government] misrepresentation—for that is what it was—in deciding not to appeal VA decisions that denied reimbursement for non-VA emergency medical care[?]").

97 *See, e.g.*, Wilson v. Gordon, 822 F.3d 934, 951 (6th Cir. 2016) (granting class certification of class of Medicaid recipients for system-wide delays and observing that the refusal to "consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses" (quotation marks omitted) (quoting Blankenship v. Secretary of HEW, 587 F.2d 329, 333 (6th Cir. 1978))).

thousands of hearings annually, without obligations to provide attorneys or adopt formal hearing procedures.[98] Appellate courts may have much more trouble ensuring that mass-adjudication programs comply with their decisions when unsophisticated parties lack access to class counsel capable of understanding and applying appellate precedent to new cases.[99] Those problems are aggravated by the small amount at stake in many government benefit decisions.

Take *Johnson v. U.S. Railroad Retirement Benefit Board*.[100] Johnson's husband died, leaving her with five children and a small monthly pension of $391.11 from the U.S. Railroad Retirement Benefit Board. But when Johnson's youngest daughter turned sixteen, her government benefits were cut to $84.11—even though the court of appeals had repeatedly held that recipients should receive benefits until their children reached eighteen.[101] When she appealed, one board official concluded that controlling precedent required cutting her benefits, even though precedent "explicitly require[d] the opposite result."[102] After another administrative appeal, a second official rejected her argument because the controlling precedent was not a "class action case and the [government] did not pursue it further."[103] When Johnson then brought a class action in federal district court, the court of appeals chastised the U.S. Railroad Board's "bold challenge to judicial authority."[104] And it recognized that, without a class, "few claimants will actually obtain the relief to which federal courts say they are entitled by law."[105] Nevertheless, the court rejected her class action because the governing statute required that she bring her $307 claim for lost monthly benefits in the court of appeals.[106]

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98 Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 323–25 (1985) (approving of the use of informal procedures in veterans-claims and prison-disciplinary hearings).

99 Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1681 (2000) ("When classwide litigation leads to reform of systemic practices, the benefits may be shared with unrepresented aliens; when counsel prevails . . . in an individual case, [the agency] can yield for the occasion without acquiescing in the legal principle more generally.").

100 969 F.2d 1082 (D.C. Cir. 1992).

101 *Id.* at 1083–85.

102 *Id.* at 1083–84.

103 *Id.* at 1084 (quotations marks omitted).

104 *Id.* at 1083.

105 *Johnson*, 969 F.2d at 1087.

106 *Id.*

Unrepresented parties with small claims often cannot hold agencies accountable to a controlling judicial decision. Overworked administrative judges barely manage to follow even a fraction of their own administrative appellate decisions.[107] In some cases, an appellate body may not even know about *its own* prior decisions.[108] Indeed, recently proposed reforms to the Board of Immigration Appeals aimed to reduce backlogs by facilitating the promulgation of even more precedential decisions for the nation's immigration courts, as well as allowing more "affirmances without opinion," which are decisions upholding deportation orders without any explanation at all.[109]

There are certainly other ways to improve legal access in appellate court, but few of them help in risky, complex, and oftentimes expensive government litigation. Legal services organizations, for example, could improve access to legal representation in appellate courts without a class action. Attorney-fee statutes offer another solution. And, in very rare cases, when petitioners can exhaust administrative remedies simultaneously, it may be "practicable" to join a small number of appeals together under Rule 3(b) of the Federal Rules of Appellate Procedure.[110]

But consistent legal representation is rarely practicable, especially given the low sums at stake and the resources required to mount serial government challenges. Parties in administrative proceedings may earn too much to qualify for legal aid representation but not enough to afford competent private legal counsel.[111]

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[107] ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 457 (6th ed. 2009). In 2021, for example, the Social Security Appeals Council received 111,722 requests for review, processed 118,415 dispositions, and still had 50,634 requests for review pending at the end of the year. SOCIAL SECURITY ONLINE, GENERAL APPEALS COUNSEL STATISTICS (2021), https://perma.cc/WAG7-XAW3.

[108] *See id.*

[109] Tal Kopan, *Trump's New Attorney General Launches Fresh Changes to Immigration Courts*, S.F. CHRON. (Apr. 12, 2019), https://perma.cc/78NB-NJCF.

[110] FED. R. APP. P. 3(b) ("When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.").

[111] "The cost of legal representation in Southern California for an adult detained in removal proceedings, for example, is approximately $4,000–$5,000." *The Agency Class Action*, *supra* note 26, at 2026 n.175 (citing How to Find Legal Help for Non-Detained Adults, ESPERANZA IMMIGRANT RTS. PROJECT (on file with the *Columbia Law Review*)). For one firm surveyed by the Government Accountability Office in 2009, the cost of legal representation for miners pursuing claims for black lung disease ranged from $18,000 for a case that took two to four years to $70 thousand for a case that took seven or more years. *See* U.S. GOV. ACCOUNTABILITY OFF., BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS' ABILITY TO PURSUE CLAIMS 26–27 (2009).

And limits on attorney's fee awards mean petitioners generally must individually pay according to an hourly rate, a fee-for-services arrangement, or a contingency agreement for years before they reach a federal court.[112] Finally, even when parties retain counsel over the years it may take to exhaust their administrative remedies, consolidation under the existing Federal Rules of Appellate Procedure is *incredibly* rare. The few common claims with counsel almost never reach appellate courts at the same time.[113] In March 2020, for example, only 347 administrative claims were consolidated on appeal across the entire federal appellate docket.[114]

The class action was developed to permit unsophisticated parties to band together to bring small claims when they otherwise lack counsel, resources, or certainty that the government will be able to adhere to a court order.[115] This may be particularly valuable when the government cannot assure that it will comply with precedent.[116] Claimants can rely on class counsel and do not have to seek separate legal representation to protect their rights in subsequent proceedings.[117] And, by uniformly resolving

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[112] The Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified in scattered sections of the U.S. Code), for example, requires agencies to pay attorneys' fees and other expenses of "prevailing" parties in "adversary" adjudications, but not when an agency is "substantially justified or [ ] special circumstances make an award unjust." 28 U.S.C. § 2412. In some government programs, those fees are sharply limited until after parties have exhausted several levels of administrative appeals. Attorney's fee awards in all of 2019 included: 8,223 for Social Security claims, 41 for claims against the Department of Homeland Security, and 22 for claims against the Department of Interior, the overwhelming number of which were not awarded until after parties reached federal court. *See* ADMIN. CONF. OF THE UNITED STATES, EQUAL ACCESS TO JUSTICE ACT AWARDS REPORT TO CONGRESS FISCAL YEAR 2019 4 (2020).

[113] *Cf.* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 815 (1990) ("[P]arties before the agency that can and do appeal to court must wait until they have exhausted administrative and judicial proceedings before they can receive the benefit of the circuit's law.").

[114] U.S. COURTS, FED. JUD. CASELOAD STATS., TABLE B-1, U.S. CTS. OF APPS.—CASES COMMENCED, TERMINATED, AND PENDING, BY CIR. AND NATURE OF PROCEEDING, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2020 (2020).

[115] *See Geraghty*, 445 U.S. at 402–03 (noting that class actions provide "economical means for disposing of similar lawsuits, and . . . the spreading of litigation costs among numerous litigants with similar claims"); *see also* Maureen Carroll, *Class Action Myopia*, 5 DUKE L.J. 843, 859–60 (2016).

[116] 2 NEWBERG ON CLASS ACTIONS § 4:35 (collecting cases finding class certification when "the defendants have not formally committed to granting class-wide relief or taken any concrete steps to address the plaintiffs' concerns" (citation and quotation marks omitted)).

[117] *See* Nehmer v. U.S. Veterans' Admin., 118 F.R.D. 113, 119 (N.D. Cal. 1987) ("Class actions enable unidentified class members to enforce court orders with contempt proceedings, rather than relying on the res judicata in a subsequent lawsuit.").

common questions in a single proceeding, class actions can even reduce government expenses—improving efficiency and consistency for parties challenging the same government practice.

3. Record development and piecemeal relief.

Individual parties also may not be able to construct the record needed for courts to craft effective relief. For example, an agency may fail to provide interpreters, record evidence, or collect other information needed to facilitate judicial review.[118] Absent some procedure that can pool information about a government policy or practice, appellate courts may simply lack the information they need to determine whether a government agency continues to violate the law.

When the first lawsuits challenging the Department of Homeland Security's policy of separating families at border crossings commenced, for example, the parties were able to file a class action in federal district court, even though the government denied that the policy existed.[119] The class action device permitted parties to pool information and conduct discovery over whether the government engaged in an unstated government policy that the court ultimately found unlawful. Had each case proceeded individually, as the government had urged, plaintiffs may have been hard-pressed to establish a system-wide government practice or to urge the court to provide class discovery needed to help ensure the government timely reunited those families.[120]

Individualized decision-making can also lead to piecemeal relief. For example, when agencies "unreasonabl[y] delay" claims because of systemic understaffing or mismanagement, individual relief can actually harm other similarly situated parties by moving individual cases ahead of others.[121] Resolving the individual claims may contribute to longer delays for class members who do

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[118] McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

[119] *See* Ms. L. v. U.S Immigr. & Customs Enf't ("ICE"), 310 F. Supp. 3d 1133, 1139 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019) (enjoining the government's separation of class members from their children); Ms. L. v. U.S. Immigr. & Customs Enf't, 415 F. Supp. 3d 980 (S.D. Cal. 2020) (enforcing the injunction in part).

[120] *Ms. L.*, 310 F. Supp. at 1145 (finding that circumstances warranted a class-wide injunction and observing that evidence gathered from class members "confirm[ed] what the Government has already stated: it is not affirmatively reuniting parents like Plaintiffs and their fellow class members for purposes other than removal").

[121] *See* Ebanks v. Shulkin, 877 F.3d 1037, 1039–40 (Fed. Cir. 2017) (recognizing that "[g]ranting a mandamus [in an individual delay case] may result in no more than line-jumping without resolving the underlying problem of overall delay").

not bring their own claims.[122] Absent a class-wide order that ensures that claims are resolved in a uniformly timely manner, piecemeal appeals may inevitably favor some individual petitioners over others.[123]

This is a particular problem in cases alleging government dysfunction. Following an exposé of the Black Lung Benefits Program, thousands of coal miners pursued a class action for fraudulent misconduct against a medical examiner who systematically denied that they had a qualifying disease.[124] But no similar class remedy exists to permit those same claimants to get new hearings in the Black Lung Benefits Program itself. In such cases, it may be difficult, if not impossible, to provide consistent relief to discrete groups of people adversely impacted by the same unlawful government practice outside of a class action.[125]

One could argue that a court could provide the same comprehensive relief using other tools, like a mandatory writ or injunctive relief, without a class action.[126] Some courts have rejected

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[122] *Id.* ("[A] judicial order putting [petitioner] at the head of the queue simply moves all others back one space and produces no net gain" (second alteration in original) (quoting *In re* Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991))).

[123] *See id.* at 1039–40 (endorsing class-wide relief over individual relief when veterans allege delays in the adjudication of their cases); Barnett v. Bowen, 665 F. Supp. 1096, 1099 (D. Vt. 1987) (concluding that a class action is "essential" to ensuring that all claims for Social Security disability benefits are decided in a uniformly timely manner).

[124] Chris Hamby, *Class Action Lawsuit Filed Against Johns Hopkins Hospital over Black Lung Program*, CTR. FOR PUB. INTEGRITY (Nov. 2, 2016), https://perma.cc/234F-C9S5.

[125] By contrast, a federal district court in Connecticut recently certified a class of veterans who claimed the Navy Discharge Review Board failed to upgrade their discharges at rates three times less than the Air Force because of systemic bias against soldiers with Post Traumatic Stress Syndrome. Manker v. Spencer, 329 F.R.D. 110, 115, 123 (D. Conn. 2018). In another case, the Social Security Administration recently settled a class action that requires it to give claimants evaluated by the same biased consulting physician a chance to seek their benefits again. Plaintiffs' Motion & Memorandum of Points & Authorities in Support of Motion for Final Approval of Class Action Settlement Agreement at 4, Hart v. Colvin, 310 F.R.D. 427 (N.D. Cal. 2015) (No. 3:15-cv-00623-JST).

[126] This is roughly the position taken by the Principles of the Law of Aggregate Litigation. Principles of the Law of Aggregate Litigation § 2.04 cmt. A, at 117–19 (Am. Law Inst. 2010) ("[T]he generally applicable nature of the policy or practice typically means that the defendant government will be in a position, as a practical matter, either to maintain or to discontinue the disputed policy or practice as a whole, not to afford relief therefrom only to the named [plaintiff]."); *see also* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1433 (2003) ("[W]hen the named plaintiff seeks an injunction, as in the typical school desegregation case, it is not even clear what is to be gained for him or the class by casting the suit in terms of a class action."). It is true that when plaintiffs target a general "policy or practice" in government litigation, the government body "[may] be in a position" to apply the same rule to everyone. Principles of the Law of Aggregate Litigation, *supra*, at 117. But that result is hardly assured. As

class action challenges to government actions under the Administrative Procedure Act, precisely because they found it unnecessary to certify a class when they could just as easily enjoin a system-wide government policy without one.[127]

But assume a party knows their legal rights, finds counsel, and maintains a live "controversy" so that an appellate court can grant some relief. Class actions still offer other benefits for parties and courts that cannot be provided by injunctive relief alone. First, a growing debate questions whether courts can enjoin the federal government against nonparties.[128] This is, in part, because litigants generally cannot seek remedies broader than necessary to resolve the harm that an individual litigant herself experiences.[129] But no one contests that class action can broaden the scope of a remedy to all members of a class or hone it down according to their differences in distinct subclasses.[130]

Second, class actions provide an important adversarial tool to ensure compliance *after* the court issues a decision.[131] This is particularly true for far-flung plaintiffs challenging opaque practices administered by many different officers in a government

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illustrated here, class actions offer another tool to combat bureaucratic drift, mismanagement, delay, and obstacles to legal outreach and representation before and after a court order.

127 *See, e.g.*, McDonald v. McLucas, 371 F. Supp. 831, 833–34 (S.D.N.Y. 1974) (finding that "the constitutionality of [the statutes at issue] can be raised and determined in an action for a declaratory judgment and injunctive relief without the necessity of a class action"); Sepulveda v. Block, No. 84 Civ. 1448 (MJL), 1985 WL 1095, at *5 (S.D.N.Y. Apr. 26, 1985), *aff'd*, 782 F.2d 363 (2d Cir. 1986) (noting the Secretary of Agriculture's argument that "class certification is not necessary" because "as a government official the relief sought by the named plaintiffs would benefit the proposed class").

128 *Compare, e.g.,* Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 375 (2018), *and* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 464–65 (2017), *and* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 629–34 (2017), *with* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 993–1007 (2020), *and* Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 90 (2019), *and* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 38–39 (2019), *and* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1090 (2018).

129 DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 246–47 (3d ed. 2002).

130 *See* Bray, *supra* note 128, at 475 (discussing class actions as the appropriate vehicle when injunctive relief for individual plaintiffs may be too narrow).

131 *See* Almendares v. Palmer, 222 F.R.D. 324, 334 (N.D. Ohio 2004) (certifying a class of plaintiffs seeking bilingual services in food-stamp program because, inter alia, it is "not clear that any injunctive relief awarded to an individual plaintiff will automatically inure to the benefit of the class as a whole"); *see also Nehmer*, 118 F.R.D. at 119–20.

bureaucracy.[132] Without class counsel available to interpret and enforce a new judicial decision before the agency, the court's mandate may be misinterpreted or ignored.

4. Congressional design.

Class actions in appellate courts, in this sense, are not inconsistent with congressional design. That is, the legislative history, purpose, and structure of many appellate review schemes show that class actions reflect what Congress often wants: to expedite big government challenges in the federal appellate courts without denying those same courts the tools to ensure that the executive branch complies with the law.[133]

Many statutes that streamline government litigation into appellate courts express Congress's hope that courts will articulate the boundaries of federal law and guide public and private actors in the future. Consider, for example, the legislative history of many of the early models for channeling statutes that culminated in the Administrative Orders Review Act of 1950[134] (AORA) (which still requires exclusive appellate review of many government programs today). The authors of the AORA hoped to reduce direct appeals to the Supreme Court.[135] But the bill's drafters also believed that litigants deserved an "appeal as of right in some appellate court" consistent with the "traditional" process to decide law.[136]

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[132] Nicholas R. Parillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 691–92 (2018) (finding "contempt motions have been made (or contempt proceedings have been otherwise initiated) against federal agencies or officials about once a week nationwide" in the last few decades for failing to comply with judicial decisions).

[133] Scripps-Howard Radio v. FCC, 316 U.S. 4, 15 (1942) (observing that if Congress had to itemize every judicial procedure and remedy, it would "stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest"); Califano v. Yamasaki, 442 U.S. 682, 699–701 (1979) (observing that in light of broad power Congress gives to courts to manage their own procedures, the statute lacked "the necessary clear expression of congressional intent" to prohibit class actions).

[134] Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified at 28 U.S.C. §§ 2341–2352).

[135] Sigalos, *supra* note 76, at 1103–04, 1103 n.40 (discussing Chief Justice Harlan Stone's hope of reducing the Supreme Court's caseload).

[136] Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearing on H.R. 1468, H.R. 1470, and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the H. Comm. on the Judiciary, 80th Cong. 27 (1947) (statement of Hon. Phillips); *see also* Sigalos, *supra* note 76, at 1103–04, 1104 n.47 (observing that the law's drafters modeled appellate review after the National Labor Relations Act and the Bituminous Coal Act, which all included exclusive appellate review provisions).

Congress has sometimes expressly said that appellate courts should use flexible consolidation procedures to perform that function. By channeling tens of thousands of veterans' claims into a federal appellate court, for example, Congress hoped to promote the same kinds of systemic challenges that are available in federal district court, even observing that "most challenges to regulations are class actions."[137] Legislators had similar hopes that review of some Department of Labor programs would permit appellate courts to consolidate and resolve systemic legal challenges more effectively and quickly.[138]

But even when Congress does not explicitly say what kinds of procedural rules federal courts should use to resolve claims—which is very often—courts enjoy broad authority to develop rules to manage the cases that come before them.[139] For that reason, courts require a "clear expression of congressional intent" before finding that Congress meant to bar certain court procedures, especially class actions.[140] Notably, Congress has not come close to doing so in most channeling statutes. Out of the nearly two hundred channeling statutes reviewed here, only one expressly prevents courts from hearing class actions.[141]

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137 H.R. REP. NO. 100-963, pt. 1, at 41–42 (1988); Monk, 855 F.3d at 1320 n.4 (observing that the "Congressional Budget Office cost estimate released shortly before the [statute creating appellate jurisdiction] was enacted suggests that Congress intended that the Veterans Court would have the authority to maintain class actions").

138 Hearings on H.R. 1362 Before the House Comm. on Interstate and Foreign Commerce, 79th Cong., 1st Sess., pt. 3, at 1084–85 (1945).

139 *See, e.g.*, *In re* Hien, 166 U.S. 432, 436–37 (1897) ("The general rule undoubtedly is that courts of justice possess the inherent power to make and frame reasonable rules not conflicting with express statute."); Kentucky v. Dennison, 65 U.S. 66, 98 (1861) ("[I]n all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process . . . .").

140 *See, e.g.*, *Califano*, 442 U.S. at 700 (holding that the statute lacked "the necessary clear expression of congressional intent" to prohibit class actions).

141 *See* 8 U.S.C. § 1252(e)(1)(B) ("[N]o court may . . . certify a class under Rule 23."). In June 2022, the Supreme Court arguably raised new questions about the durability of this "clear statement" doctrine in *Aleman Gonzalez*. In *Aleman Gonzalez*, the Supreme Court decided that another provision of the Immigration and Nationality Act (INA), which did not expressly foreclose class actions, still barred class-wide injunctive relief under Federal Rule of Civil Procedure 23, and perhaps even more traditional forms of joinder. Garland v. Aleman Gonzales, 142 S. Ct. 2057, 2068 (2022) (observing, without deciding, that a "literal reading [of § 1252(f)] . . . could rule out efforts to obtain any injunctive relief that applies to multiple named plaintiffs (or perhaps even rule out injunctive relief in a lawsuit brought by multiple named plaintiffs)"). But a better reading of *Aleman Gonzalez* is that the doctrine retains its vitality. The Court stressed that cases supporting the doctrine, like *Califano v. Yamasaki*, 442 U.S. 682 (1979), were "quite different" because the applicable section of the INA was expressly designed to limit judicial review and injunctive relief. *See Aleman Gonzales*, 142 S. Ct. at 2068 (distinguishing *Califano* and suggesting that

Class actions are also consistent with appellate courts' role in the U.S. judicial hierarchy: to develop the law. By channeling disputes into appellate courts, Congress has chosen a forum designed to give content to federal law and ensure that the executive branch complies with it. If Congress *only* wrote channeling statutes to bring a quick end to private disputes, Congress could just as easily require that parties file petitions in a federal district court with no opportunity to appeal.[142] Channeling review ensures that appellate courts, with the power to authoritatively and coherently interpret law, do so for the government bodies that operate in the broad geographic regions they oversee.[143] Class actions further that goal by enabling courts to maintain jurisdiction over large numbers of small, transient, or intangible claims that would otherwise evade judicial review.

To be sure, class actions raise some structural concerns for appellate courts, but they should not be overstated. First, although parties would not have the same number of opportunities to appeal a class action decision as they would if it began in a federal district court, en banc panels of circuit judges and the Supreme Court would often exercise virtually the same discretion to review an appellate court class action as an appellate court would when reviewing a district court class action decision.[144] Second, while

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§ 1252(f) "simply uses different language" from § 1252(e) to "bar class-wide injunctive relief and extends no further.") In contrast, the vast majority of appellate judicial review statutes *enable* direct appellate review and do not contain limitations on injunctive relief. *See* Appendix A; *see also* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance"' and "Procedure"' in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1044–45 (1989) ("If, as the Supreme Court has assured us, Congress legislates against the background of Federal Rules and does not lightly seek their displacement, there should be very few statutory provisions remaining that are inconsistent with Federal Rules.")

142 *See, e.g.*, REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 306 (2005) (codified as amended at 8 U.S.C. § 102(c)) (foreclosing appellate court review of DHS waivers designed to "ensure expeditious construction" of the U.S. border wall with Mexico); Currie & Goodman, *supra* note 22, at 9 (observing that the "more significant advantage of single-tier district court review is the conservation of judicial resources").

143 *See supra* text accompanying notes 63–69.

144 *See In re* BancorpSouth, Inc., No. 16-0505, 2016 WL 5714755, at *1 (6th Cir. Sept. 6, 2016) (comparing the "unfettered" discretion to review a district court class action decision to the "discretion of the Supreme Court in considering whether to grant certiorari"); 3 NEWBERG ON CLASS ACTIONS § 7:41 (observing appellate courts have "unfettered discretion [about] whether to permit the appeal" of a lower district court's class action decision). To be sure, there are some differences between en banc review and traditional appellate review of class actions. First, en banc review normally does not exist to correct errors the way that traditional appellate review does. *See* RULES AND INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 34 (2020) (noting that en banc review "is an extraordinary procedure that is intended to bring to the

class actions theoretically could increase the dockets of appellate courts, filing rates in the appellate courts that use them suggest they do not meaningfully add to their overall caseload. [145] Third, appellate courts, which often sit in rotating panels to decide important legal questions, may not manage parties as efficiently as a single judge. But randomly assigned, three-judge district court panels do hear federal legal challenges, often relying on class actions to do so.[146] And historically, policymakers trusted and preferred three-judge courts for quick resolution of important, pressing national questions, much like when Congress assigns government challenges to federal appellate courts.[147]

One final concern—the extent to which appellate courts can resolve factual questions to hear a class action—is discussed in more depth in Part III.A. But, for now, it is important to note that although this question raises the question of *which* class actions federal appellate courts can hear—as well as *how* they may hear them—limits on appellate fact-finding need not be seen as a

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attention of the entire court an error *of exceptional importance*" (emphasis added)). However, en banc review exists largely (if not entirely) to develop the law and ensure uniformity, FED. R. APP. P. 35(a) (framing en banc review as appropriate to "secure or maintain uniformity of the court's decisions" or if "the proceeding involves a question of exceptional importance"), which would not be very different from en banc review of most class appeals, which will involve many cases across the administrative system. S*ee infra* Part III.B. Moreover, parties in district courts normally have a right to appellate review of a class-certification decision if they litigate to a final judgment, which is not the same as discretionary en banc review. However, to the extent that appellate panels work much like three-judge district court panels, *see infra* Part III.B, they both often have the last word in important government litigation on the existence of any errors.

[145] In the past three years, parties have filed a total of twenty-two class actions out of the annual 6,800-case docket heard by the nine judges on the Court of Appeals for Veterans Claims. That docket almost equals the administrative caseload for all 179 judges on all thirteen federal appellate courts *combined*. *See* U.S. COURTS, U.S. COURTS OF APPEALS FED. JUD. CASELOAD STATS. (2021), https://perma.cc/4EHT-LHFA (highlighting 7,147 appeals commenced from government agencies last year); *see also infra* Part II.B–C.

[146] *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1947–48 (2011) (affirming class action decision issued by a three-judge panel). *See generally* Brown v. Board of Ed., 98 F. Supp. 797 (D. Kan. 1951) (class action before three-judge court), *rev'd*, 347 U.S. 483 (1954).

[147] *See* Stephen I. Vladeck, *F.D.R.'s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*, N.Y. TIMES (Jan. 7, 2022), https://perma.cc/X4SB-KLRV (arguing that three-judge panels "reduce the cherry-picking of outlier judges"; produce "more consistent decision making"; and offer "a more efficient path to full merits review by the Supreme Court"); Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 727–38 (2020); Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 124–25 (2014); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 7 n.40 (1964) ("I am opposed to allowing one little federal judge to stand up against the governor and the legislature and the attorney general of the State and say, 'This act is unconstitutional.'" (quoting 45 Cong. Rec. 7256 (1910) (statement of Sen. Overman))).

barrier to *whether* appellate courts hear class actions at all. After all, government cases are traditionally channeled into appellate courts because they presumably involve legal questions that will not turn on difficult factual determinations. And when factual questions do materialize, federal appellate courts have the power to retain jurisdiction and remand those questions to district court judges, special masters, and administrative agencies.

Finally, all courts that review agencies—whether they are called "district" or "appellate" courts—ultimately perform similar functions: they deferentially review an agency's findings of fact to determine if they are supported by the evidence, reasonably explained, and lawful.[148] The Judicial Conference, for example, is currently considering whether federal *district* courts should adopt new rules modeled after the Federal Rules of Appellate Procedure to resolve large numbers of social security cases.[149] But those rules specifically permit class actions, so parties may continue to challenge the "constitutionality or validity of statutory and regulatory requirements, or [make] similar broad challenges to agency policies and procedures."[150]

It may seem strange to conclude that class actions are consistent with a congressional scheme that assigned cases to courts that lack explicit rules for them. But the Supreme Court has long recognized that courts can flexibly manage the cases that come before them, much like other "agencies of government."[151] The

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[148] *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 952–63 (2011) (describing the emergence of an "appellate" review model of agency action); Richard J. Pierce, Jr., *Confessions of an Administrative Law Pollyanna*, YALE J. ON REG. (Jan. 16, 2018), https://perma.cc/R28B-JGEM.

[149] *Supreme Court of the United States*, *Proposed Amendments to the Federal Rules of Civil Procedure* (Apr. 11, 2022) [hereinafter *Proposed Amendments*], https://perma.cc/75ES-ZE29. As a report from ACUS observed, Social Security cases make up 7% of federal district courts' dockets, generating far "more litigation for district courts than any other type of appeal from a federal administrative agency." ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2016-3: SPECIAL PROCEDURAL RULES FOR SOCIAL SECURITY LITIGATION IN DISTRICT COURT 2 (2016) [hereinafter ACUS, Recommendation 2016-3].

[150] ACUS, Recommendation 2016-3, *supra* note 149, at 7; *see also id.* at 8. ("These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal."); *Proposed Amendments*, *supra* note 149, at 3; ("These rules govern [the review of social security cases] that present[ ] only an individual claim.").

[151] *Scripps-Howard Radio*, 316 U.S. at 15; *see also* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008) ("Congress delegates authority not only to agencies, but to courts as well."); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1039–41 (2006).

same is true for the Federal Rules of Appellate Procedure.[152] The idea that courts enjoy procedural powers unless the law says they do not is grounded in similar structural concerns about the expertise, incremental decision-making, and decisional independence we expect from our courts.[153] Courts enjoy more expertise than Congress at crafting procedural rules for managing cases that come before them. Courts sit in a better position, after the fact, to incrementally adjust procedures based on how people respond to the new substantive rights and responsibilities that Congress creates.[154] And, as a separate branch of government, Congress presumably values the judiciary's independent ability to create procedural rules to manage its own affairs and interpret the law.

As set forth below, affording appellate courts the limited jurisdiction to entertain class actions in extraordinary cases under the All Writs Act is consistent with this same goal: permitting direct appeals so that appellate courts can develop expertise and reduce uncertainty, while giving those same courts the flexibility to hear and resolve classes of similar claims that otherwise might escape judicial resolution.

II. AUTHORITY UNDER THE ALL WRITS ACT AND PROCEDURAL EXPERIMENTATION

As it happens, appellate courts already enjoy limited authority to fashion procedures, including class actions, under the All Writs Act. The All Writs Act permits federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[155]

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[152] *See* FED. R. APP. P. 47 (stating that, in cases not provided for by rule, courts of appeals may regulate their practice in any manner not inconsistent with legislation and appellate rules); UAW Local 283 v. Scofield, 382 U.S. 205, 211 (1965) (permitting intervention in a court of appeals by the prevailing party before an agency despite the absence of a uniform federal appellate rule authorizing intervention).

[153] *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 841 (2008) ("Even apart from expertise, which does not itself confer power, the federal courts have a stronger claim to constitutional authority in matters of procedure than in matters of substance.").

[154] *See, e.g.*, Ford Motor Co. v. Labor Board, 305 U.S. 364, 373 (1939):

> The jurisdiction to review the orders of the [agency] is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.

[155] 28 U.S.C. § 1651(a).

Courts have long relied on the All Writs Act to develop procedures to fill in gaps of authority and flexibly resolve new disputes. The All Writs Act provides courts with the power to resolve issues that may ordinarily escape detection or judicial resolution. For that reason, it even extends to writs in aid of a court's *prospective* jurisdiction—that is, over claims not yet before the court but pending in an administrative agency or lower court.[156]

Using their powers over agencies and courts, appellate courts have fashioned remedies designed to provide relief to large groups of people. Appellate courts have also developed procedural rules to review systemic government misconduct—most notably in the context of habeas and veterans class actions—without a specific rule to do so.

A. Appellate Supervision of Courts and Agencies Under the All Writs Act

Appellate courts have long used their power under the All Writs Act to protect their jurisdiction and correct systemic errors. For example, in *La Buy v. Howes Leather Co.*,[157] the Supreme Court approved the Seventh Circuit's writ against a persistent practice in the Northern District of Illinois of routinely referring cases to magistrates without a jury trial.[158] After spending years individually admonishing trial judges for overusing special masters, the Seventh Circuit relied on the All Writs Act to vacate those referrals.[159] The Court squarely rejected the dissent's argument that courts could not issue writs against systemic problems that had yet to reach the Seventh Circuit.[160] Instead, the Supreme Court held that the Seventh Circuit's action was appropriate to protect its future jurisdiction over those cases, to uniformly

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156 *See, e.g.*, McClellan v. Carland, 217 U.S. 268, 280 (1910) ("[W]here a case is within the appellate jurisdiction of the higher court[,] a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943) (stating that appellate courts' authority to issue writs of mandamus "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected"); Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984).

157 352 U.S. 249 (1957).

158 *Id.* at 250–60.

159 *Id.* at 257–58.

160 *Id.* at 257–60 (rejecting the "conten[tion] that the Seventh Circuit has erroneously construed the All Writs Act as 'conferring on it a "roving commission" to supervise interlocutory orders of the District Courts in advance of final decision'").

protect the rights of parties, and to conserve judicial resources associated with more appeals and new trials.[161]

The *La Buy* decision dramatically expanded the authority of federal courts of appeals to issue writs "in aid of" their jurisdiction under the All Writs Act.[162] Up until that point, many believed that appellate courts' powers under the All Writs Act were "strictly auxiliary" to the cases before it.[163] Although some prominent judges later questioned the continued viability of *La Buy*,[164] the Supreme Court and other courts continue to support the flexible use of the All Writs Act to prevent repeated errors by courts and agencies.[165]

Appellate courts' authority under the All Writs Act applies equally to federal agencies.[166] Courts have used common law writs to provide relief from systemic government misconduct since the eighteenth century.[167] Since then, appellate courts have been "amply armed" to provide relief from unlawful government action

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[161] *Id.* at 259–60 ("We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.").

[162] Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1259 (2007) ("Until *La Buy*, the authority of federal courts of appeals to direct writs of mandamus to federal trial courts 'in aid of' the appellate court's jurisdiction was very narrow."); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 114 (1975) (describing how *La Buy* expanded the scope of appellate mandamus under the All Writs Act).

[163] *La Buy*, 352 U.S. at 263–65 (Brennan, J., dissenting) (collecting cases describing appellate courts' "strictly auxiliary power" under the All Writs Act).

[164] *E.g.*, First Nat'l Bank of Waukesha v. Warren, 796 F.2d 999, 1004–05 (7th Cir. 1986) (Easterbrook, J.) ("*LaBuy* is defunct.").

[165] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–82 (2004); Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 309–10 (1989); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 16 FED. PRAC. & PROC. JURIS. § 3934.1 (3d ed. 2018) (collecting cases).

[166] FTC v. Dean Foods Co., 384 U.S. 597, 606–12 (1966); United States v. N.Y. Tel. Co., 434 U.S. 159, 171–78 (1977); Michael v. INS, 48 F.3d 657, 664 (2d Cir. 1995) (stating that the All Writs Act authorizes courts to enter stays of removal in aid of their prospective jurisdiction); Kyei v. INS, 65 F.3d 279, 281–82 (2d Cir. 1995) (affirming All Writs Act authority but denying a stay of removal on the facts of the case); Cleveland v. Fed. Power Comm'n, 561 F.2d 344, 346 (D.C. Cir. 1977); ILGWU v. Donovan, 733 F.2d 920, 922 (D.C. Cir. 1984) (per curium); Am. Trucking Ass'n v. ICC, 669 F.2d 957, 961 (5th Cir. 1982) ("Litigation in scores of cases is not [sic] adequate remedy for an agency's failure to carry out its statutory duties. Therefore, there is no adequate alternative remedy.").

[167] James E. Pfander & Jacob Wentzel, *The Common Law Origins of* Ex parte *Young*, 72 STAN. L. REV. 1269, 1296–1306, 1309–11 (2020) (describing the evolution of common law writs in England and the United States to police government action); *see also* JAFFE, *supra* note 62, at 176 (describing the use of writs of certiorari and mandamus as "the twin pillars of the common law of judicial control").

under the All Writs Act.[168] "These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies."[169]

In the past, some appellate courts have used mandatory writs much like class actions, ordering agencies adjudicating thousands of claims to change their unlawful programs in one fell swoop. After unions, shippers, and businesses sued the Interstate Commerce Commission (ICC) for illegally processing thousands of licenses, the Fifth Circuit ordered the ICC to revamp its regulations for all shippers to stave off "the potential for massive future litigation."[170] The court underscored the importance of providing uniform relief to a mass adjudication system through a writ of mandamus: "The volume of matters the ICC is handling is so great," the court observed, that "applicants, opponents, and the public, as well as the Commission, should know with certainty the terms of our opinion and enforcing mandate."[171]

But appellate courts' ability to fix problems under the All Writs Act still has its limits. The Supreme Court has said that appellate courts cannot use the All Writs Act when a specific statute already "addresses the particular issue at hand."[172] Litigants, for example, cannot invoke the All Writs Act to remove state cases to federal court because a federal removal statute already governs that process.[173]

Additionally, plaintiffs may need a class action to ensure that the government does not frustrate their claims before courts effectuate relief for large groups of people. The Supreme Court, for example, recently rejected the Ninth Circuit's efforts to end pretrial shackling of criminal defendants in San Diego federal court.[174] The Ninth Circuit had ruled that it could still enjoin the practice, even after the petitioners were released, because the inherently transitory nature of the pretrial practice meant that the Ninth Circuit might not receive another opportunity to review

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168 *Cleveland*, 561 F.2d at 346 (D.C. Cir. 1977).

169 *Id.*

170 *American Trucking Ass'n*, 669 F.2d at 961; *see also id.* ("Litigation in scores of cases is not adequate remedy for an agency's failure to carry out its statutory duties. Therefore, there is no adequate alternative remedy.")

171 *Id.*

172 Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) (quoting Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985)). *But see* Steinman, *supra* note 162, at 1285 (emphasis in original) ("[T]he All Writs Act is precisely designed for circumstances where more specific statutes do *not* provide for the necessary remedy.").

173 *Syngenta Crop Prot.*, 537 U.S. at 31.

174 United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1539–40 (2018).

it.[175] The Supreme Court reversed. It reasoned that the petitioners' claims had become moot upon release. Absent a class action on behalf of plaintiffs subject to the ongoing practice, no live claim existed for the Ninth Circuit to resolve.[176]

However, as explained below, the All Writs Act also permits courts to develop procedures where none exist "in aid of" their jurisdiction, including class action rules that prevent the government from selectively mooting claims that challenge the same unlawful policy.

B. Appellate Use of Class Actions Under the All Writs Act

The All Writs Act also includes the power to craft innovative procedures to protect a court's jurisdiction. In other words, the writ offers a "legislatively approved source of procedural instruments" not confined to "the precise forms of that writ in vogue at the common law or in the English judicial system."[177] In light of the need to protect their jurisdiction, the Supreme Court has held it is "essential not to limit appellate courts to the ordinary forms and purposes of legal process."[178] Appellate courts may thus "fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage" under the All Writs Act.[179]

Since the 1970s, appellate courts have held that this power includes the ability to fashion class action–like rules in habeas cases, even in the absence of an express rule to do so. In *United States ex rel. Sero v. Preiser*,[180] for example, the Second Circuit held that courts enjoyed the power to hear habeas class actions against government institutions "by analogy" to Rule 23 of the

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175 United States v. Sanchez-Gomez, 859 F.3d 649, 659 (9th Cir. 2017) (reasoning that, because pretrial shackling is "inherently ephemeral," a court of appeals "[i]n its supervisory mandamus role" can enjoin harm from a "policy affecting a huge class of persons who aren't parties to the mandamus petition").

176 *Sanchez-Gomez*, 138 S. Ct. at 1539–40.

177 Price v. Johnston, 334 U.S. 266, 282 (1944); *see also* United States v. Catoggio, 698 F.3d 64, 67 (2d Cir. 2012) ("The broad power conferred by the All Writs Act is aimed at achieving 'the rational ends of law,'" and "[t]hus, courts have significant flexibility in exercising their authority under the Act."); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1203 (9th Cir. 1975) ("The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure [sic] that miscarriages of justice within its reach are surfaced and corrected.").

178 *Price*, 334 U.S. at 283; *see also Pa. Bureau of Corr.*, 474 U.S. at 43 ("[The All Writs] Act empowers federal courts to fashion extraordinary remedies when the need arises.").

179 Harris v. Nelson, 394 U.S. 286, 299 (1969).

180 506 F.2d 1115 (2d Cir. 1974).

Federal Rules of Civil Procedure.[181] The Court believed that aggregating the claims was necessary because petitioners lacked access to counsel, underscoring the inefficiency of "hearing and deciding numerous individual petitions."[182] Finding that the petitioners met all of the standard criteria under the modern class action rule, the court found a "compelling justification" under the "unusual circumstances" of the case to permit a "multi-party proceeding."[183]

The Supreme Court has highlighted the importance of habeas classes to allow courts to review live constitutional claims against government entities. In *United States Parole Commissioner v. Geraghty*[184]—a habeas class action that challenged the U.S. Parole Board's new guidelines for release—the Supreme Court found that the petitioner still retained an independent "personal stake" in representing the class after his release.[185] In so holding, the Court recognized that the class was necessary to protect the court's own jurisdiction, noting that many claims would be "so inherently transitory" that a court might not reach a class certification motion "before the proposed representative's [ ] interest expires."[186] Although the Supreme Court has never squarely decided the viability of habeas class actions, circuit courts continue to allow them to preserve courts' jurisdiction in situations where the executive branch effectively controls whether the case will expire before judgment.[187]

Most recently, building on the history of the use of habeas class actions, the Federal Circuit ruled that an appellate court could hear class actions in aid of its jurisdiction under the All Writs Act.[188] The U.S. Court of Appeals for Veterans Claims, which exclusively reviews veterans' benefit decisions, was

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181 *Id.* at 1125 (quoting *Harris*, 394 U.S. at 299) (internal quotation marks omitted).

182 *Id.* at 1126 (citation omitted).

183 *Id.* at 1125.

184 445 U.S. 388 (1980).

185 *Id.* at 404 (reasoning that "vigorous advocacy can be assured through means other than . . . a 'personal stake in the outcome'" and that the respondent "continues vigorously to advocate his right to have a class certified").

186 *Id.* at 399.

187 *See, e.g.*, Martin v. Strasburg, 689 F.2d 365, 374 (2d Cir. 1982) (applying Rule 23's requirements to a representative habeas action), *rev'd on other grounds sub nom.*, Schall v. Martin, 467 U.S. 253 (1984); United States *ex. rel.* Morgan v. Sielaff, 546 F.2d 218, 221 (7th Cir. 1975) (same); Rodriguez v. Hayes, 591 F.3d 1105, 1121–26 (9th Cir. 2009) (same); Napier v. Gertrude, 542 F.2d 825, 827 n.2 (10th Cir. 1976) (same); Solomon v. Zenk, No. 04-CV-2214, 2004 WL 2370651, at *5 (E.D.N.Y. Oct. 22, 2004) (same); Kazarov v. Achim, No. 02 C 5097, 2003 WL 22956006, at *3 & n.8 (N.D. Ill. Dec. 12, 2003) (same).

188 Monk v. Shulkin, 855 F.3d 1312, 1318–21 (Fed. Cir. 2017).

modeled after other federal appellate courts that exclusively review large administrative adjudication programs described here.[189] Although an Article I court, the appellate court enjoys all of the same powers as any other federal court of appeals under the All Writs Act and hears a tremendous number of appeals.[190] In 2018, it received 6,802 appeals, which was more than the number of appeals from federal agencies filed in every Article III circuit court that year *combined*.[191] Nevertheless, shortly after it was created, the court summarily concluded that it lacked the authority to hear or manage class actions and that, as an appellate court, it could better address repeat problems with binding precedential decisions.[192]

The Federal Circuit recently overturned that decision in *Monk v. Shulkin*,[193] holding that the court of appeals could hear class actions under the All Writs Act.[194] The court reasoned that, without a class action device, the government could routinely avoid litigation that would impact large groups of unrepresented veterans by selectively mooting their claims.[195] The class action, according to the Federal Circuit, ensured that the court of appeals would continue to perform the role that Congress imagined: acting "as lawgiver and error corrector simultaneously, while also reducing delays associated with individual appeals."[196] The procedural flexibility of the All Writs Act to hear class actions also promoted "efficiency, consistency, and fairness, and improv[ed]

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189 *See, e.g.*, Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc) (describing the "exclusive" jurisdiction of the Court of Appeals for Veterans Claims).

190 *See* Cox v. West, 149 F.3d 1360, 1363 (Fed. Cir. 1998) ("By its express terms, the [All Writs Act] unambiguously applies to 'all courts established by Act of Congress.' The Court of Veterans Appeals is such a court." (quoting 28 U.S.C. § 1651(a) (1994))); Bates v. Nicholson, 398 F.3d 1355, 1359 (Fed. Cir. 2005) (affirming that the All Writs Act applies to the Court of Appeals for Veterans Claims).

191 *Compare* ROBERT N. DAVIS, STATEMENT OF THE HONORABLE ROBERT N. DAVIS, CHIEF JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS FOR SUBMISSION TO THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON APPROPRIATIONS COMMITTEE ON THE APPROPRIATIONS SUBCOMMITTEE ON MILITARY CONSTRUCTION, VETERANS AFFAIRS, AND RELATED AGENCIES 6 (2018), *with* U.S. Courts Administrative Office, TableB-5—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2018).

192 Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991) (per curiam).

193 855 F.3d 1312 (Fed. Cir. 2017).

194 *Id.* at 1318 ("We see no limitation in the All Writs Act precluding it from forming the authoritative basis to entertain a class action.").

195 *Id.* at 1321 (observing that "[c]ase law is replete with such examples").

196 *Id.* (citation and internal quotation marks omitted).

access to legal and expert assistance by parties with limited resources."[197]

Since the *Monk* decision in 2017, veterans' legal organizations and other plaintiffs have brought more than twenty appellate class actions against the Department of Veterans Affairs, and the court has certified three of them.[198] Many challenge the same kinds of delays, procedural barriers, and systemic problems described Part I.B—challenges that, up until then, people had not been able to commence in appellate courts. They include: (1) unfair notice provisions,[199] (2) procedural barriers to obtaining claim forms,[200] (3) unlawful rating decisions,[201] (4) wrongful denials of emergency medical reimbursement,[202] and (5) refusals to adjudicate caregiving claims under federal law.[203] Although these cases still comprise a small percentage of the court of appeals' total docket, they paint a stark portrait of the dangers of channeling cases into appellate courts without the tools to aggregate and address them. Many of these cases raise longstanding issues that have gone unaddressed for years, even decades—from unexplained ministerial delays[204] to toxic exposures that date back to the 1960s.[205]

This is not to say that class actions under the All Writs Act are a panacea, and particularly not for institutional reform cases that require intense factual development. Courts typically only grant relief under the All Writs Act to protect "clear and indisputable" rights or answer "important" and "undecided" questions

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197 *Id.* at 1320.

198 Wolfe v. Wilkie, 32 Vet. App. 1, 23–24 (2019); Godsey v. Wilkie, 31 Vet. App. 207, 225 (2019); Skaar v. Wilkie [hereinafter *Skaar I*], 32 Vet. App. 156, 201 (2019). Ten have been dismissed on various grounds outlined below. As of July 13, 2022, nine classes remain pending and are listed on the Court of Appeals for Veterans Claims website. *See Active Panel, Stayed, and Class Action Cases*, U.S. CT. OF APPS. FOR VETERANS CLAIMS (Mar. 22, 2022), https://perma.cc/B89F-MDWV.

199 Rosinski v. Shulkin, 29 Vet. App. 183, 185 (2018).

200 Request for Class Certification and Class Action at 1, Murray v. McDonough, Vet. App. No. 21-947 (Feb. 9, 2021).

201 Ward v. Wilkie, No. 16-2157, 2018 WL 6314662, at *1 (Vet. App. Dec. 4, 2018) (assessing a class consisting of "veterans who are or will be subject to an unlawfully stringent standard for compensation based on aggravation of a secondary disability" (citation and quotation marks omitted)).

202 *Wolfe*, 32 Vet. App. at 23.

203 Beaudette v. McDonough, 34 Vet. App. 95, 100–01 (2021).

204 Monk v. Wilkie, 30 Vet. App. 167, 179 (2018); *Godsey*, 31 Vet. App. at 214.

205 *See Skaar I*, 31 Vet. App. at 17–18.

that are likely to recur.[206] As a result, some classes routinely granted in federal district courts may not be available to appellate courts under this procedure.[207] Nevertheless, class actions offer a critical tool for many of the problems described here: large numbers of related claims that never reach appellate courts because of systemic government delays, procedural deficiencies, or dysfunction.

In this way, appellate class actions serve a different role than class actions in administrative agencies. Administrative class actions, I've argued, can give agencies a necessary "first bite" at hearing large numbers of similar cases efficiently, uniformly, and consistently with their expertise.[208] Instead, appellate class actions, at their core, protect a *court's* power to hear cases, interpret law, and afford relief, when the government's systemic actions otherwise frustrate judicial review.

C. Class Actions at the U.S. Court of Appeals for Veterans Claims

This Section takes a first look at nascent experiments with appellate classes. The U.S. Court of Appeals for Veterans Claims incremental approach to hearing class actions offers insights into how other appellate courts can exercise their authority to do the same. These experiments have helped the court forge new rules to determine appropriate cases for class certification, develop facts, identify class members, and hone tools to effectuate judicial relief.

A class action, like other procedures under the All Writs Act, requires that an individual file a petition with an appellate court asking for a "representative" or "class" proceeding. It can involve any person wronged by a government body—including those who

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[206] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 381 (2004) (citations and internal quotation marks omitted) (quoting Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 403 (1976)) (granting mandamus for "clear and indisputable" rights); Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (granting mandamus review of a "basic undecided question"); United States v. Pleau, 680 F.3d 1, 4 (1st Cir. 2012) (finding that mandamus is available in cases where there is an unsettled issue of law "of substantial public importance," where the issue is "likely to recur," and where "deferral of review would potentially impair the opportunity for effective review or relief later on" (citing United States v. Horn, 29 F.3d 754, 769–70 (1st Cir.1994))).

[207] *See* Skaar v. Wilkie [hereinafter *Skaar II*], 32 Vet. App. 156, 195–96 (observing that the "unique nature [of the Court of Appeals for Veterans Claims] requires considerations beyond those applicable to district courts" and that "class actions before this Court are the exception, not the rule").

[208] *The Agency Class Action*, *supra* note 26, at 2053.

haven't yet filed an appeal—so long as that person has taken some "first preliminary step" that might lead to a future appeal.[209] But, in several of its first class actions, the court reached out even further, actively encouraging amicus briefing from veterans' organizations, legal clinics, and class action scholars about what portions of the traditional rules for class actions could be adopted for an appellate court.[210] The court then decided several cases that confronted technical questions about the use of class actions in an appellate court, including requirements for adequately representing the class[211] and the kinds of common issues that warrant class treatment.[212] In cases where the court has certified a class, the court has then ordered the agency to identify class members, to

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[209] Mylan Lab'ys. Ltd. v. Janssen Pharmaceutica, N.V., 989 F.3d 1375, 1380 (Fed. Cir. 2021). Courts have concluded that when an agency's actions threaten a court's *prospective* jurisdiction to hear new cases, a class action under the All Writs Act may include people at different stages of the appellate process. *Wolfe*, 32 Vet. App. at 23 ("A court may use this [All Writs Act] power 'where an appeal is not then pending but may be later perfected.'" (quoting FTC v. Dean Foods Co., 384 U.S. 597, 603–04 (1966))).

[210] *Rosinski*, 2017 WL 2938576, at *1 (inviting amicus briefing in an order); *Monk*, 2017 WL 4861820 (inviting amicus briefing in an unpublished opinion). In the interest of full disclosure, I note that I authored several amicus briefs on behalf of law professors of civil procedure, administrative law, and federal courts in both cases. *See generally* Amicus Brief of Administrative Law, Civil Procedure, and Federal Courts Professors, Rosinski v. Shulkin, Vet. App. No. 17-1117, U.S. Court of Appeals for Veterans Claims, Aug. 10, 2017, https://perma.cc/P4WU-9ZGW; *Amicus Brief of Administrative Law, Civil Procedure, and Federal Courts Professors in* Monk v. Shulkin, Vet. App. No. 15-1280, U.S. Court of Appeals for Veterans Claims, Amicus Brief of Administrative Law, Civil Procedure, and Federal Courts Law Professors, February 8, 2018, https://perma.cc/6URT-VD2X.

[211] The court has required that parties have counsel to commence a class action—an unsurprising decision, except for the fact that the vast majority of veterans filing claims have historically filed pro se or with the assistance of Veterans Service Organizations. *See, e.g.*, Thompson v. Wilkie, 30 Vet. App. 345, 347 (2018) (following other circuit courts rejecting pro se class actions); *cf.* ANNUAL REPORT, U.S. CT. OF APP. FOR VETS. CLAIMS OCT. 1, 2016 TO SEPT. 30, 2017 (FISCAL YEAR 2017) 1–2 (2018) (showing that roughly a third of petitions and appeals filed with the Court of Appeals for Veterans Claims are pro se); ANNUAL REPORT, U.S. CT. OF APP. FOR VETS. CLAIMS, OCT. 1, 2015 TO SEPT. 30, 2016 (FISCAL YEAR 2016) 1–2 (2017) (same); ANNUAL REPORT, U.S. CT. OF APP. FOR VETS. CLAIMS, OCT. 1, 2014 TO SEPT. 30, 2015 (FISCAL YEAR 2015) 1–2 (2016) (same).

[212] In an en banc decision, the *Monk* court evenly split—four to four—over whether to certify a class of all veterans whose claims had been delayed by more than one year. *Monk*, 30 Vet. App. at 169. Citing the Supreme Court's decision in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011), four judges believed the class lacked commonality, pointing to the fact that parties could not identify a particular policy or practice that "glue[d]" the claims together. *Id.* at 175 (quoting *Wal-Mart*, 564 U.S. at 255–60, 352). Four others believed the discrete legal question, whether a one-year delay was per se unreasonable, could be applied to all class members. Some opposing certification, however, described how a narrower class would succeed. *Id.* at 183 (Davis, C.J., concurring) ("This is not to say that, in a case where petitioners show that the weights on the balancing-test scales are the same for each class member, the Court would not certify a class to challenge *part* of VA's appellate process." (emphasis in original)).

readjudicate their claims consistent with the relief it ordered, or to produce status reports so that the court and class counsel could monitor its progress.[213] After three years managing class actions without them, the court of appeals finally adopted formal rules to hear class actions on the day before Veterans Day, November 10, 2020. [214]

Three class actions influenced the court's final rule—and each offers important insights into how other appellate courts can use similar authority to find facts, navigate precedent, and structure relief. First, the court has remanded some cases to the VA to determine whether enough facts supported a motion to certify a class.[215] For example, in *Skaar v. Wilkie,*[216] the court of appeals remanded a class action challenging how the VA measures radiation exposure back to the Board of Veterans Appeals.[217] Because of its own limited fact-finding authority, the court instead gave the VA ninety days to assess how many plaintiffs were subject to the VA's methodology, while retaining jurisdiction over the action.[218] Relying on those findings, the court held the lead plaintiffs' claims were typical of other class members who were denied compensation for radiation exposure and that the class was sizable enough to warrant class certification.[219]

Second, the court has grappled with when to certify a class instead of relying on more traditional tools in its arsenal, like

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213 *See Wolfe*, 32 Vet. App. at 40; *Godsey*, 31 Vet. App. at 230 (identifying class members); *Skaar I*, 31 Vet. App. at 18 (producing supplemental reports).

214 *See* U.S. VET. APP. R. 22–23 (noting the date that the Rules were added); *see also* Amy B. Kretkowski, Evolution of a Class Action Rule, Power Point Presentation to the USCAVC Judicial Conference, April 11, 2019 (on file with author).

215 Order, *Skaar v. Wilkie*, No. 17-2574, at *2 (Vet. App. filed Feb 1, 2019) (issuing a limited remand to the Board of Veterans Appeals to determine whether facts support class certification).

216 31 Vet. App. 156 (2019).

217 *Id.* at 18.

218 *Id.* Most federal appellate courts have similar procedures to remand decisions to agencies for fact-finding. *See infra* note 245 and accompanying text.

219 *Skaar II*, 31 Vet. App. at 19 ("[W]e clarify that the Court may, in certain circumstances, retain jurisdiction over limited remands to the Board."). The VA was unable to comply with the court's order to identify the numbers of veterans in different subclasses, citing the limitations of the VA's own internal databases. *Skaar II*, 32 Vet. App. at 191. It was able to identify that almost 1,388 participated in the nuclear cleanup that gave rise to the dispute. *Id.* A better document-retention system, for a more recent dispute, could assist the court not only in determining the appropriateness of class certification but also in affording relief. *See, e.g.*, Respondent's 120-Day Status Update in Response to the Court's June 13, 2019 Order at 1, *Godsey*, 31 Vet. App. 207 (No. 17-4361) (Vet. App. filed Aug. 13, 2019) (successfully identifying and certifying review of thousands of cases unreasonably delayed within months).

issuing a precedential opinion. The court of appeals' first successful class action, *Godsey v. Wilkie*,[220] raised this question when petitioners challenged the VA's persistent delays in transferring appellate records for review—a ministerial process that, on average, took nearly one thousand days after veterans filed their substantive appeals.[221] The court certified the class and found that the VA's practice violated the petitioners' rights to due process. The court reasoned that allegations of systemic delay were "best addressed in the class action context" because individual decisions would "result in no more than line-jumping without resolving the underlying problem of overall delay."[222] The court also found that it could more "easily and efficiently" monitor compliance through a class action than by requiring unrepresented claimants to file more individual petitions.[223]

In short, the court held that class actions were superior to precedential decisions when the relief itself required some form of active, judicial management. To that end, the court ordered the VA to identify all the class members subject to the same ministerial delay and to produce status reports on its progress.[224] Relying on the VA to work with class counsel to identify cases for adjudication proved very effective. Within four months, the Department of Veterans Affairs reported that it had resolved over 2,106 of the 2,544 delayed claims in the class.[225]

Third and relatedly, the court has used class actions to effect structural relief when the government does not comply with its own binding decisions. For example, the *Wolfe v. Wilkie*[226] class challenged the VA's practice of denying emergency medical coverage to veterans who received partial coverage from other insurance.[227] In 2016, the court had already rejected the VA's practice

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220 31 Vet. App. 207 (2019).

221 ANNUAL REPORT, U.S. CT. OF APP. FOR VETERANS CLAIMS: OCT. 1, 2016 TO SEPT. 30, 2017 (FISCAL YEAR 2017) 1–2 (2018).

222 *Godsey*, 31 Vet. App. at 224 (quoting Ebanks v. Shulkin, 877 F.3d 1037, 1039–40 (Fed. Cir. 2017)).

223 *Id.* (citing *Monk*, 855 F.3d at 1321).

224 *Id.* at 230 (ordering the secretary to conduct a "pre-certification review of all cases that fit within the class definition" within 120 days).

225 *See* Respondent's 120-Day Status Update in Response to the Court's June 13, 2019 Order at 1, *Godsey*, 31 Vet. App. 207 (No. 17-4361) (Vet. App. filed Aug. 13, 2019). Observing that the VA had "faithfully complied" with its class action order, the court ordered a new status report in 120 days. Order, *Godsey*, No. 17-4361, at *1 (Vet. App. filed Aug. 13, 2019).

226 32 Vet. App. 1 (2019).

227 *Id.* at 23.

of denying emergency room coverage.[228] But the VA continued to do so anyway. It even went further—affirmatively telling veterans that they would not receive coverage for the very emergency medical care that the court had ordered.[229] Fed up, the court concluded that a class action was necessary: "Who knows how many veterans relied on such a misrepresentation—for that is what it was—in deciding not to appeal VA decisions that denied reimbursement for non-VA emergency medical care"?[230] In pointed language, the court ruled that a class-wide judgment was the only realistic answer for unrepresented veterans challenging the VA's refusal to follow the court's precedent.[231]

Unlike *Godsey*, however, *Wolfe* also required the court to take firm steps to effectuate relief, demonstrating the importance of class-wide remedies to resolve recurring government disputes. After the court certified the class, it ordered the VA to stop sending letters containing its erroneous reading of the law, to notify claimants that they were eligible to be reimbursed for their emergency room benefits, and to give claimants new hearings.[232] But the VA struggled to comply with the court's orders—delaying the corrected notices,[233] misinforming veterans about their rights (again),[234] and losing track of which veterans received hearings or reimbursements.[235] Many problems only came to light after class counsel reviewed the VA's status reports, interviewed and responded to complaints from class members, and raised concerns

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[228] Staab v. McDonald, 28 Vet. App. 50, 55 (2016).

[229] *Wolfe*, 32 Vet. App. at 12.

[230] *Id.*

[231] The court said:

> Here, though *another* precedential decision would undoubtedly bind VA, Petitioner Wolfe's allegations uniquely highlight the inferiority of a precedential decision under the facts before us. VA could circumvent another decision—as it allegedly did *Staab*—without concern about enforcement beyond another appellate proceeding. If we award the Wolfe Class's requested relief, any class member (particularly those who are absent) who suffers VA's noncompliance could enforce it.

Id. at 33 (emphasis in original).

[232] *Id.* at 41.

[233] Order, *Wolfe v. Wilkie*, No. 18-6091, at *1 (Vet. App. filed Apr. 6, 2020).

[234] *Id.*; Petitioner's Opposed Motion for Enforcement of the Court's Order of September 9, 2019 and Other Relief at 9, *Wolfe v. Wilkie*, 31 Vet. App. 207 (No. 18-6091) (noting that for six months after the *Wolfe* decision, the VA's website continued to assert that it would not reimburse for emergency medical care).

[235] *See generally* Petitioner's Opposed Motion for Appointment of a Special Master to Enforce the Court's Judgment, in *Wolfe v. Wilkie*, 31 Vet. App. 207 (No. 18-6091) (describing obstacles to government notification and compliance with courts' orders).

with the VA's own data.[236] In March 2021, the court appointed a special master to supervise the VA's outreach efforts, a solution that would not have been practical in individual adjudication.[237]

In short, experiments in *Skaar*, *Godsey*, and *Wolfe* helped the court forge new rules to develop facts, identify class members, select appropriate cases for class certification, and refine tools to monitor compliance with its own orders. In the process, the class action created a vehicle for the court to learn about systemic problems and to protect its own jurisdiction to hear cases otherwise frustrated by delay, poor record-keeping, or maladministration.[238]

But, in many of the above cases, the court was also forced to grapple with whether an appellate court's traditional mechanism to correct unlawful agency action—binding precedent—was enough. In *Skaar*, the court created an avenue to temporarily remand the case to the agency for more fact-finding to determine the need for a class action.[239] In *Godsey*, the court found that only a class-wide judgment could provide the legal access and

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[236] *Id.*

[237] Wolfe v. McDonough, 34 Vet. App. 162, 167 (2021); *see supra* Part I.B.3 (discussing how individualized decisions limit courts' ability to collect information about government policies or practices and thereby implement appropriate remedies). As this article was going to press, the Federal Circuit reversed the writ of mandamus in *Wolfe*, but it did not decide whether the class action was warranted. *See Wolfe*, 28 F.4th at 1360 (Fed. Cir. 2022) (declining to "reach the issue of class certification). Instead, it found that one of the traditional requirements for a writ of mandamus was missing—that a traditional appeal couldn't have achieved the same result. *Id.* at 1357 (Fed. Cir. 2022) (stating that mandamus "should be resorted to only where appeal is a clearly inadequate remedy" (quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953))). Notably, the Federal Circuit did not address many of the on-the-ground obstacles unrepresented veterans reported when appealing the same unlawful policy, like those described above. It also appeared to ignore cases, like those described in Part II.A, where courts have relaxed mandamus requirements for recurring legal issues or those that threaten the separation of powers. As several commentators and judges argue, mandamus "should primarily be employed to address questions likely of significant repetition prior to effective review, so that [the court's] opinion would assist other jurists, parties, or lawyers." Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 359 (2012) (alteration in original) (citation omitted); *see also* United States v. Horn, 29 F.3d 754, 770 (1st Cir. 1994) ("We regard the case for mandamus here as especially compelling because it is important in the right way. It poses an elemental question of judicial authority."). Nevertheless, somewhat mysteriously, the court appeared to leave the door open for relief when the government obstructs people from filing claims. *Wolfe*, 28 F.4th at 1359 ("We have no occasion to determine what forms of equitable relief might be available if the government inappropriately deterred potential claimants from pursuing their claims.").

[238] Petitioner's Opposed Motion to Clarify the Role of Class Counsel at 1–2, *Wolfe v. Wilkie*, 31 Vet. App. 207 (No. 18-6091) (describing the role of class counsel in identifying government errors and effecting compliance with the court's judgment).

[239] *See* 31 Vet. App. at 18.

uniformity necessary to respond to systemic delays.[240] And, in both *Godsey* and *Wolfe*, the court concluded that a class action ensured better compliance with its own orders than case-by-case precedential decision-making.[241] Each case illustrates the value of case management tools, including class actions, to support the courts' traditional role in authoritatively deciding law.

III. PROCEDURAL INNOVATION AND OUR CHECKS AND BALANCES

There are many good reasons to question whether other appellate courts would broadly adopt class actions under the All Writs Act. The Supreme Court has become increasingly skeptical of using aggregate litigation, including class actions and other creative procedural tools, to challenge unlawful government actions.[242]

But beyond what the Supreme Court might say about them, appellate classes raise concerns about how judges can and should exercise power over facts, the coordinate branches of government, and procedural rules designed to limit their authority. First, when appellate bodies must find facts outside of an existing record to certify a class, they risk upsetting the balance of power between themselves and the fact-finding tribunals they review. Second, appellate classes place the legality of the government's nationwide programs in the hands of a single, regional appellate court. Finally, when judges develop class procedures out of whole cloth, they assume new power to change preexisting rules that are meant to apply the same way across different cases, parties, and judges.

When used cautiously, however, appellate courts can adopt class procedures consistent with the judiciary's historic role in reviewing agency action, its place in our governmental framework, and the boundaries of its procedural authority. First, courts acting in an appellate capacity historically have considered new facts to determine whether government officials acted unlawfully. Moreover, class challenges may promote better interactions between the judicial and executive branches—allowing courts to

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240 *See* 31 Vet. App. at 224.

241 *See id.*; 32 Vet. App. at 33.

242 *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring in part and concurring in the judgment) ("This Court has never addressed whether habeas relief can be pursued in a class action."); United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1539–40 (2018) (rejecting exercise of appellate courts' "supervisory jurisdiction" under the All Writs Act to preserve claims without a class action).

review recurring problems and avoid piecemeal remedies that frustrate the operation of a national bureaucracy. And procedural experiments may be particularly justified in situations that have already given rise to some appellate class actions—particularly in instances where policymakers lack the ability to design critical rules without insights from case-by-case adjudication.

A. Appellate Class Actions and Fact-finding

Because class actions often require courts to resolve many complex factual questions, they present challenges for appellate bodies.[243] For that reason, in one of the only decisions to explicitly reject an appellate class action, then-Judge Ruth Bader Ginsburg declared that an "appellate mode of proceeding is not compatible with designation and management of a class."[244] But the history behind that idea is not so clear cut. When legislatures require that appellate bodies directly review agencies, they have long used tools, like special masters and remands to agencies, to assess whether government officials acted unlawfully.[245] And the Court of Appeals for Veterans Claims has shown that class actions are indeed possible in cases that frustrate their jurisdiction to decide recurring legal questions.

One intriguing aspect of appellate classes is that they risk upsetting appellate courts' traditional approach to facts. Appellate courts are supposed to be courts of "review, not of first view."[246] That is, they typically respect factual determinations made by other bodies so long as they are not clearly wrong. Class actions, however, often require factual development beyond a single trial or administrative record: How many people were

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[243] Maine v. Taylor, 477 U.S. 131, 144–45 (1986) ("[F]actfinding[ ] is the basic responsibility of district courts, rather than appellate courts." (quotation marks omitted) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982))).

[244] Burns v. U.S. R.R. Ret. Bd., 701 F.2d 189, 191 (D.C. Cir. 1983). That case did not involve a class action under the All Writs Act, but rather, one under the appellate court's "inherent authority" to hear classes. Justice Ginsburg believed that federal district courts should hear those cases. For the reasons discussed in Part I.A, however, courts have rejected that position to prevent gamesmanship, avoid uncertainty, and promote the development of law. *See, e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1, 24 (2012) (Alito, J., dissenting); *Johnson*, 969 F.2d at 1084–87, 1093.

[245] FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 469 (1984) (holding that federal appellate courts may use special masters or agency remand to resolve factual questions when Congress directly channels judicial review); JAFFE, *supra* note 62, at 186–87 (describing circumstances in which federal and state courts have historically used agency remands or conducted fact-finding themselves).

[246] Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005).

adversely impacted by the agencies' practice? Did the plaintiffs raise factual questions common to an entire class of people? Some of the most valuable class actions against government entities may require very detailed fact-finding to determine whether a common practice applies to a class of people, which is a task often performed by district courts.[247]

It is unclear, however, how far to take concerns about the limits of appellate fact-finding when Congress deliberately upends appellate courts' role in the judicial hierarchy. When Congress writes laws that send cases directly into appellate courts to *facilitate* judicial review, is it clear that Congress meant to deny those same courts the power to review evidence of misconduct that frustrates their jurisdiction? Or should those courts have access to procedures used by district courts, long tasked with that same kind of job?

Allowing appellate courts to resolve factual questions is consistent with history. In the nineteenth century, federal and state appellate courts often determined factual questions themselves under different mechanisms, including writs of mandamus,[248] to evaluate whether government officials violated a clear legal duty.[249] In those cases, courts took evidence like any court sitting in law or equity. For example, when Congress created a special commission to resolve land disputes with Mexico in 1854, it gave claimants the right to "appeal" to a federal court in California. (Congress did not create "intermediate" courts of appeals until 1891.)[250] The Supreme Court held the designated court could resolve both law and facts for itself, observing that it would not be "misled by a name" and instead would "look to the substance and intent of the proceeding."[251]

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[247] *See* Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 84 (2019) (describing historical examples of civil rights class actions where what "tie[d] the potential plaintiffs together [was] not the defendant's inability to treat them differently, but the defendant's actual conduct that treat[ed] them similarly"); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 799–805 (2016).

[248] JAFFE, *supra* note 62, at 160–64; Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 295–97 (1948) (describing the historical development of judicial review of administrative orders); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787-1801, 115 YALE L.J. 1256, 1334–37 (2006); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 200–29 (1991) (describing models of judicial review in the nineteenth century); Merrill, *supra* note 148, at 946–53.

[249] Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1407–11 (2010).

[250] Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

[251] *See* United States v. Ritchie, 58 U.S. (17 How.) 525, 534 (1854); *see also* Merrill, *supra* note 148, at 950 (discussing *Richie* and the broad fact-finding powers exercised by

Over time, legislatures modified ancient writs to accommodate the growth of modern agencies, generally respecting agencies' administrative determinations unless "clearly erroneous."[252] But courts still retained the ability to find facts themselves in extraordinary cases. New Jersey appellate courts could assess new facts or ask agencies themselves to do it for them.[253] California courts adopted a mixed approach. They reviewed the existing administrative record (a process associated with a writ of certiorari), but also independently took new evidence when government officials improperly refused evidence (much like a writ of mandamus)—or what some called "certiorarified mandamus."[254] In the 1940s, Congress similarly preserved federal courts' power to decide facts necessary to issue writs "which may be necessary for the exercise of their respective jurisdictions."[255] Even as federal and state legislatures cut back on judicial power to make new factual determinations, they recognized occasions for courts to determine factual questions when necessary to establish when officials violated the law.[256]

Developing facts in such cases was key to maintaining courts' own role in an increasingly complex and modern administrative state. But even in such cases, appellate courts have used their authority cautiously to resolve only those factual questions necessary to the exercise of their jurisdiction. Mindful of their limited jurisdiction to resolve factual disputes, appellate courts have avoided needlessly issuing writs, while establishing tools to

courts in the nineteenth century); Adam S. Zimmerman, *Presidential Settlements*, 163 U. PA. L. REV. 1393, 1411–12 (2015) (describing historical use of mandamus review to reverse administrative claim commissions until 1949).

252 Merrill, *supra* note 148, at 965–72 (describing early twentieth century development of statutes providing for a more "appellate model" of review of agency action than those rooted in mandamus or habeas).

253 N.J. RULE 2:10-5 (1953).

254 *See* Ralph N. Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285, 285 & n.1, 286–88 (1950) (describing the history and changes to the California code to improve review of state agencies).

255 28 U.S.C. § 377 (1940) (current version at 28 U.S.C. § 1651) (providing that federal courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law").

256 Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 404 n.8 (2004) (Ginsburg, J., dissenting) ("When federal law imposes an obligation, however, [judicial review] is not precluded simply because facts must be developed to ascertain whether a federal command has been dishonored.").

determine narrow factual issues—using special masters and limited remands to agencies to supplement the record.[257]

For example, as discussed above, the United States Court of Veterans Appeals for Veterans Claims recently remanded a class action challenging how the VA measures radiation exposure.[258] In addition to asking the VA to determine how many plaintiffs were impacted by the VA's methodology, the Court also asked the agency to determine whether the methodology was grounded in "sound scientific evidence." On remand, the court gave the agency ninety days to reach a conclusion based on the parties' evidentiary submissions.[259] Giving agencies the chance to explain old scientific judgments, or make new ones, reflects one way appellate courts, like the CAVC, have balanced their roles as courts with limited jurisdiction over a coordinate branch of government, while maintaining their authority to hear from parties and interpret the law.[260]

For challenges that target deficiencies in an agency's hearing process, federal appellate courts may also appoint special masters. Courts have long enjoyed the "power to provide themselves with appropriate instruments required for the performance of their duties," which includes the "authority to appoint persons unconnected with the court to aid [them]."[261] Appellate courts can do so under one of three routes. First, courts of appeals may appoint a special master to hold hearings on matters "ancillary to the proceeding[ ]" under the federal rules of appellate procedure.[262] Second, appellate courts could appoint a special master or

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[257] WRIGHT & MILLER, supra note 165, at 845–46 (observing the practice where appellate courts retain jurisdiction for the "purpose[ ] . . . [of] facilitat[ing] immediate review of further proceedings before the trial court or agency"); Ucelo–Gomez v. Gonzales, 464 F.3d 163, 170 (2d Cir. 2006) (issuing a limited remand to the agency to "decide the scope of [a] statutory term in a fact context sufficient[ ]" for appellate review); Caterpillar, Inc. v. NLRB, 138 F.3d 1105, 1107–08 (7th Cir. 1998) (issuing a limited remand to the agency to approve a settlement, while keeping jurisdiction so that the parties do not have to refile in case the settlement was not approved); Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993) (issuing limited remand to the agency to provide the reasoning for its decision).

[258] *Skaar I*, 31 Vet. App. at 17–18.

[259] *Skaar II*, 32 Vet. App. at 171; see also *supra* notes 219–22 and accompanying text.

[260] *See, e.g.*, *Elgin*, 567 U.S. at 19 (describing the power of the Federal Circuit to maintain exclusive jurisdiction over legal questions while remanding to the Merit Systems Protection Board to administer oaths and develop the factual record).

[261] *Ex parte* Peterson, 253 U.S. 300, 312–13 (1920).

[262] FED. R. APP. P. 48. With almost no case law, it unclear where to draw the line on what "ancillary" means for Rule 48 appointments. On the one hand, the rule has typically only applied to attorney misconduct or fee disputes. *See, e.g.*, *In re* Deepwater Horizon,

remand to a district court under a special statute like the Administrative Orders Review Act, which channels many cases into appellate courts.[263] Third, the court could appoint a special master under its inherent authority, like that possessed by the Court of Appeals for Veterans Claims,[264] or under the All Writs Act itself.[265]

Although such procedures may seem cumbersome and unorthodox, the Supreme Court has endorsed them for laws that channel systemic government challenges into federal appellate courts.[266] After a law sent class-wide challenges against a federal employment board into the Federal Circuit, the Supreme Court rejected the dissent's arguments that agency remands created "an odd sequence of procedural hoops for petitioners to jump through."[267] The Court defended the process of agency remands, observing "we see nothing extraordinary in a statutory scheme that vests reviewable fact-finding authority in a non–Article III entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain."[268] In so doing, the Court compared the procedure to federal judges who rely on other non–Article III officers, like magistrate judges or agency officials.[269]

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824 F.3d 571, 576 (5th Cir. 2016) (discussing the appointment of a special master to conduct a fact-finding investigation into ethical violations); FED. R. APP. P. 48 Advisory committee note (discussing attorney's fees). On the other hand, the rule seems designed to provide for situations where an appellate court cannot remand to an agency or a court to develop the "merits," and so, must rely on a judicial adjunct. One could argue that class certification remains "ancillary" to whether an agency has violated the All Writs Act, even though questions about class action certification frequently overlap with the merits. *See* Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

263 28 U.S.C. § 2347(b)(3); *see, e.g.*, Gallo-Alvarez v. Ashcroft, 266 F.3d 1123, 1129–30 (9th Cir. 2001) (transferring an immigration petition to a district court "for further development of the record").

264 *See Wolfe*, 34 Vet. App. at 164.

265 Harris v. Nelson, 394 U.S. 286, 300 (1969) (noting that "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry" into the petitioner's claim).

266 *Elgin*, 567 U.S. at 13–14; *see also ITT World Commc'ns*, 466 U.S. at 469 (recommending special masters or agency remand to develop the record when statutes channel judicial review directly to appellate court); *Telecommunications Research & Action Ctr.*, 750 F.2d at 78 (recommending the same and noting that "[w]e find untenable any suggestion that appellate review of nonfinal agency action may be inadequate due to Courts of Appeals' inability to take evidence").

267 *Elgin*, 567 U.S. at 32 (Alito, J., dissenting).

268 *Id.* at 19.

269 *Id.*

A persistent question will be how much power federal appellate courts should give to other officers to decide important factual questions related to class certification or their own jurisdiction.[270] A special master should not be a "roving commissioner of justice."[271] When appellate courts allow officers to review unlawful government action, they arguably give up one of the benefits of federal judicial review—an independent, generalist review of the coordinate branches that binds all parties. For that reason, appellate courts may choose to limit agency remands and special masters to cases raising discrete, sophisticated factual questions—like the impact of a common policy or delay on similarly situated parties. And they may reserve for themselves questions that threaten the integrity of the court's own proceedings, like potential conflicts of interest between class members, structural concerns with a government adjudication process, or whether a government agency has complied with the court's mandate.[272]

B. Appellate Class Actions and Separation of Powers

Appellate class actions also raise concerns about how appellate courts can limit the executive branch's power to defend its views about federal law in other regional courts.[273] But, in some cases, class actions preserve our separation of powers and improve dialogue between the judicial and executive branch. This enables appellate courts to review persistent problems while avoiding remedies that, when applied one at a time, aggravate discrepancies and delays.

By way of background, appellate courts try to craft precedential decisions to avoid creating unnecessary splits with courts in

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[270] An analogy can be found in 28 U.S.C. § 636(b). That statute prevents non–Article III magistrate judges from formally *resolving* class action motions, but still empowers them to "conduct hearings, including evidentiary hearings" for district court review. In practice, district courts frequently rely on magistrate judges to take evidence necessary to resolve class action motions. *Cf.* Douglas A. Lee & Thomas E. Davis, "*Nothing Less Than Indispensable": The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845, 932 (2016) (tracing the rise in magistrate judge utilization to the "increased legal and evidentiary complexity" of district court cases).

[271] *Wolfe*, 34 Vet. App. at 168.

[272] *E.g.*, American Trucking Ass'n v. ICC, 669 F.2d 957, 961 (5th Cir. 1982) (approving the aggregate relief necessary to effectuate a mandate given that "[l]itigation in scores of cases is not adequate remedy for an agency's failure to carry out its statutory duties").

[273] Estreicher & Revesz, *supra* note 39, at 729 (arguing that executive power to do so is "embedded in the congressional choice in favor of administrative government").

other circuits.[274] But the potential for differences between circuits is a feature, not a bug, for courts and agencies.[275] A driving reason for our intermediate appellate courts was to create courts that could thoroughly air legal disputes.[276] And, for agencies, limited precedential decision-making offers flexibility to continue to administer large, bureaucratic programs in other regions not covered by a particular court, banking on the idea that it may convince another court of appeals to accept its view of the law.[277]

Moreover, a court decision is technically only binding on the parties to that case.[278] For this reason, some have asserted that federal agencies may continue to disregard a seemingly applicable precedent *in that very circuit*.[279] Agencies defending this idea, a tongue-twisting doctrine called "intracircuit nonacquiescence," also point to the important role of facilitating dialogue between courts and agencies.[280] When the government can resist appellate decisions issued inside the same circuit, appellate courts can revisit their decisions in light of other appellate courts and avoid escalating issues to the Supreme Court. In this way, limited precedential decision-making plays an important role in arbitrating our separation of powers—permitting different members of the

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[274] *See, e.g.*, *In re* Korean Air Lines, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis."); Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1039 (1999) (listing harms of appellate unpredictability); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 779–80, 794 & n.401 (1995) (noting how appellate courts sometimes decide cases in ways that mollify circuit splits).

[275] For a recent critique of the conventional wisdom that legal issues should be allowed to percolate through disagreement in the lower courts, see generally Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363 (2021).

[276] United States v. Stauffer Chem. Co., 464 U.S. 165, 177 (1984) (White, J., concurring) ("The policy against inconsistent decisions is much less relevant outside the original circuit. Conflicts in the circuits are generally accepted and in some ways even welcomed.").

[277] Estreicher & Revesz, *supra* note 39, at 737–38; *Johnson*, 969 F.2d at 1093.

[278] *See* U.S. v. Mendoza, 464 U.S. 154, 158–63 (1984).

[279] *See, e.g.*, Rebecca Hanner White, *Time for A New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 674 (1991) (calling for the abandonment of the "law of the circuit" doctrine when confronting Board nonacquiescence); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 832 (1990) ("The courts may not, however, in the absence of express congressional authorization, act to truncate the dialogue by erecting a per se bar against intracircuit nonacquiescence."); Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence,* 75 MINN. L. REV. 1339, 1413 (1991) (summarizing agency defenses of intra-circuit nonacquiscence).

[280] Estreicher & Revesz, *supra* note 39, at 743.

judicial branch to "say what the law is,"[281] while allowing the executive branch to develop and defend its own legal interpretations and policies.

But no principle of class action law requires courts to limit a class to a single state or region. Instead, courts enjoy wide discretion to certify classes for all similarly impacted parties, regardless of where they live in the country.[282] That discretion may be particularly important when plaintiffs seek "indivisible" remedies for organizational delay or dysfunction—increased funding, new training, or other organizational reforms that cannot be neatly carved out from region to region.[283] How should rules that typically empower courts to certify nationwide classes be balanced against executive power to defend its own interpretations of law in different appellate courts?

One the one hand, it is true that class actions theoretically could threaten dialogue between circuits and with federal agencies in much the same way that some commentators complain about nationwide injunctions outside the class action context.[284] One classic study of nonacquiescence, for example, involved cases where the Reagan administration ignored injunctions entered by district courts and affirmed by courts of appeals in the Second and Ninth Circuit against the Social Security Administration.[285] Although the study did not focus on the procedure the parties used to obtain those injunctions, many were class actions.[286] Unsurprisingly, it found that agencies expressed a similar concern about how agencies and courts interact with each other—that a

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

[282] Califano v. Yamasaki, 442 U.S. 682, 699–701 (1979) (reasoning that the district court's decision to certify a nationwide class action fell within the court's broad "discretion").

[283] PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04(a) at 117 (AM. LAW INST. 2010) (defining "[i]ndivisible remedies" as those where "the distribution of relief to [any] claimant will 'as a practical matter' determine the application or availability of [the same remedy] to other claimants").

[284] *See supra* note 128 and accompanying text.

[285] *See* Estreicher & Revesz, *supra* note 39, at 692–703; Ruppert v. Bowen, 871 F.2d 1172, 1177 (2d Cir. 1989) ("The SSA evidently considers itself bound only by the decisions of the Supreme Court and by those decisions of the applicable circuit court to which the SSA has not announced its objections." (first citing Press Release, HHS NEWS, DEP'T HEALTH AND HUM. SERVS.. (June 1985)**;** and then citing OFF. OF HEARINGS & APPEALS, STAFF GUIDES AND PROGRAMS DIGEST BULLETIN NO. III-I 4 (Aug. 1986)).

[286] *See, e.g.*, Estreicher & Revesz, *supra* note 39, at 699–703 (offering an in-depth discussion of *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984) and *Stieberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), which were both class actions).

single court's determination would "prematurely truncate" dialogue about whether an agency acted lawfully.[287]

But the *failure* to hear class actions can cut the other way—threatening our separation of powers by impairing the judiciary's ability to "say what the law is," while truncating important dialogue between courts and the executive branch. Courts have repeatedly chastised agencies like the Social Security Administration for violating judicial power to determine the law by ignoring appellate decisions.[288] Others have complained that this practice contravenes one of the traditional justifications for the legitimacy of agency adjudication: the availability of judicial review.[289] They have observed that Congress provided that "courts would review the actions of agencies—not vice versa."[290]

As importantly, many challenged agency practices—multi-year backlogs, insufficient notice, and inadequate translators, doctors, or records—frustrate an appellate court's ability to hear those very claims individually and issue opinions needed to efficiently guide future administrative action.[291] Congress itself nearly barred the Social Security Administration's practice of ignoring appellate decisions, observing that government refusals to adhere to circuit precedent have the "clearly . . . undesirable

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[287] *Id.* at 685.

[288] Capitano v. Secretary of Health & Human Servs., 732 F.2d 1066, 1070 n.9 (2d Cir. 1984) (criticizing the Social Security Administration); *Ruppert*, 871 F.2d at 1177 (2d Cir. 1989) (criticizing the Social Security Administration); *Johnson*, 969 F.2d at 1090 (criticizing the Railroad Retirement Board); Young v. Shinseki, 25 Vet. App. 201, 215–16 (2012) (criticizing the Veterans Administration); *see also* Coenen, *supra* note 279, at 1400 & nn.314–19 (collecting cases and observing that "[i]nfuriated federal judges have called intracircuit nonacquiescence 'utterly meritless,' 'intolerable,' 'outrageous,' 'shocking,' a 'symbolic bookburning,' and the equivalent of 'the repudiated pre-Civil War doctrine of nullification'" (citations omitted)).

[289] *See* Thomas v. Heckler, 598 F. Supp. 492, 496 (M.D. Ala. 1984) (noting that, by providing for judicial review, the Social Security Act "recognizes the primacy of the courts in determining the law"); Joshua Schwartz, *Nonacquiescence,* Crowell v. Benson*, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1850–51 (1989); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 819 (1990) (noting that judicial review "is the principal means" used by Congress "to hold agencies accountable to statutory limitations on agency power"). *But see* Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 1368 (2018) (recognizing that some "constitutional functions[ ] that can be carried out by 'the executive or legislative departments' without judicial determination" (citations and quotation marks omitted)).

[290] Dan T. Coenen, *The Constitutional Case Against Intracircuit Non-Acquiescence,* 75 MINN. L. REV. 1339, 1375 n.186 (1991).

[291] *Cf.* Diller & Morawetz, supra note 113, at 826 (describing the "serious due process concerns" raised when agencies can unilaterally delay the "application of judicial standards" in a particular circuit.).

consequence' of generating repetitious appeals costly to both claimants and the government."[292] And, as illustrated in Part II,[293] even when cases reach an appellate court, a precedential decision does not offer much when unrepresented parties cannot understand and apply it. Instead of intruding on the executive branch, the flexible use of aggregate litigation may ensure that courts have the power to hear transitory claims and that appellate decisions are carried out.

Finally, some forms of relief may only be available through class-wide adjudication. Parties seeking structural or organizational reforms—new training programs to avoid bias, funding, and hiring practices—may not be easy to break up along regional lines.[294] Such relief has long provided a basis for national class action adjudication for this very reason.[295] In some cases, class actions involving organizations and their interconnected practices may actually promote better interactions between the judicial and executive branches—avoiding piecemeal remedies that, applied one at a time, aggravate delays, frustrate the uniform operation of a national bureaucracy, and limit access to justice.[296]

These very concerns gave rise to the modern class action in the United States. Court reformers believed that piecemeal challenges were no match for large institutions and government bureaucracies.[297] The effort to remake the class action coincided with efforts after *Brown v. Board of Education*[298] to desegregate southern schools. According to the late Charles Alan Wright, one of the lead drafters of modern class action rule, class action rule-makers were "keenly interested" in organizational practices used by government bodies to create end-runs around desegregation

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[292] Coenen, *supra* note 279, at 1377 (quoting H.R. Doc. No. 1039, 98th Cong., 2d Sess. 38, *as reprinted in* 1984 U.S.C.C.A.N. 3080, 3096 (Conf. Rep.)) (alteration in original).

[293] *See supra* notes 220–238 and accompanying text.

[294] 2 NEWBERG ON CLASS ACTIONS § 4:35 (collecting cases where class-wide relief was necessary to bring about "institutional change[ ]").

[295] *See* Marcus, *supra* note 2, at 702; David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 608 (2013).

[296] *Godsey*, 31 Vet. App. at 214 (finding that class-wide relief in an appellate court was necessary to avoid inconsistent relief that would aggravate delays); Ebanks v. Shulkin, 877 F.3d 1037, 1039-40 (Fed. Cir. 2017) (finding that class-wide relief was necessary to prevent "line-jumping" that would occur when courts hear individual petitions for mandamus for unreasonable delay).

[297] Marvin Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966) ("[T]he class action's 'historic mission [was] taking care of the smaller guy.'" (quoting Civil Rules Committee Reporter, Benjamin Kaplan)).

[298] 347 U.S. 483 (1954).

decisions.[299] For example, when school districts demanded that black students individually exhaust state administrative remedies to benefit from a desegregation order, an early Fifth Circuit decision, *Potts v. Flax*,[300] held that the class could still be certified to combat an unlawful policy: "Exhaustion of internal school system administrative remedies is not required so long as racial segregation is the authoritative accepted policy."[301] Rule-makers revised the class action rule to make clear that courts could use class actions to protect our courts' role in our separation of powers as arbiters of the law, specifically including *Potts* as an exemplar among cases alleging systemic government misconduct.[302]

One way to accommodate these competing concerns may be found in lower federal court experiments with public interest class actions. In the early 1970s, federal district courts created a "necessity doctrine." It requires that courts weigh whether a class action is necessary, in light of all the other tools courts can use to bind the government, including precedential decisions and injunctions.[303] Most recently, the U.S. Court of Appeals for Veterans Claims' rules now require that parties explain why a class action, instead of a precedential decision, is necessary to give plaintiffs the relief they want.[304]

In these cases, courts have still found class actions "necessary" to safeguard courts' role in our separation of powers. Courts

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299 Marcus, *supra* note 2, at 703 n.267 (quoting Letter from Charles Alan Wright, Professor of Law, Univ. of Texas, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Feb. 16, 1963), *microformed on* CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.)).

300 313 F.3d 284 (5th Cir. 1963).

301 Potts v. Flax, 313 F.2d 284, 290. (5th Cir 1963).

302 *See* FED. R. CIV. P. 23(b)(2) Advisory Committee Notes to the 1966 Amendments (recommending courts certify classes for injunctive or declaratory relief even when the defendant's actions threaten only "one or a few members of the class, provided [the defendant's conduct] is based on grounds which have general application to the class."); *see also* Maureen Carroll, Alexandra D. Lahav, David Marcus & Adam S. Zimmerman, *Government Class Actions After* Jennings v. Rodriguez, HARV. L. REV. BLOG (MAY 8, 2018), https://perma.cc/UG4N-QGZB; Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 859–60 (2016); Marcus, *supra* note 2, at 705.

303 For early appellate court decisions endorsing this doctrine, see, for example, Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs., 31 F.3d 1536, 1548 (10th Cir. 1994); Sandford v. R.L. Coleman Realty Co., 573 F.2d 173, 178 (4th Cir. 1978); Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976), *rev'd on other grounds*, 436 U.S. 1 (1978); United Farmworkers of Fla. Hous. Project, Inc. v. Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974); Galvan v. Levine, 490 F.2d 1255, 1261–62 (2d Cir. 1973).

304 U.S. VET. APP. R. 22(a)(3) (requiring petitioners to explain why a class action "would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis").

have relied upon class actions when, among other things, the government can strategically frustrate claims, avoid judicial review, or ignore its judgments.[305] All of these cases illustrate the limits of traditional, case-by-case adjudication for unrepresented government litigants: without a class-wide judgment, courts cede power to other government institutions to determine the scope of judicial relief from their own unlawful policies.[306]

Over the years, administrative agencies have themselves discarded precedential decision-making in favor of other tools that can promote consistency and efficiency—including rulemaking, guidance, and data analytics designed to pool information about pending claims.[307] In the same way, courts charged with policing agencies may need similar case management tools (like class actions) to ensure that parties pool information necessary for a fulsome record and to effectuate judgments that correspond to novel complaints about systemic government misconduct.

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[305] Courts have found class certification warranted when, among other things, (1) the plaintiff's claims "might be rendered moot" by the government without a class; (2) a class action necessarily "facilitate[s] enforcement of the judgment by class members"; (3) no certainty exists that the government "would apply the judgment uniformly to all members of the proposed class"; or (4) "a class [is] an effective device to bring about institutional change[ ]." 2 NEWBERG ON CLASS ACTIONS § 4:35 (collecting cases); Karen L. *ex rel.* Jane L. v. Physicians Health Services, Inc., 202 F.R.D. 94, 103–04 (D. Conn. 2001) (collecting cases); *Nehmer*, 118 F.R.D. at 118–20 (rejecting the necessity requirement and finding class action an effective tool to bring about change in the Veteran's Administration regulations).

[306] *See* Daniel Tenny, *There Is Always A Need: The "Necessity Doctrine" and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018, 1037–39 (2005) (collecting cases and noting that the government may believe an injunction in an individual case applies to a different group of beneficiaries than the court does).

[307] Kristin E. Hickman, Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 984 (2021) ("[C]ontemporary agencies more often use rulemaking [rather than adjudication] when making significant interpretive pronouncements."); Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 670 (2008) ("[F]ederal agencies lean toward interpretive rules and policy guidance whenever possible."); Felix F. Bajandas & Gerald K. Ray, IMPLEMENTATION AND USE OF ELECTRONIC CASE MANAGEMENT SYSTEMS IN FEDERAL AGENCY ADJUDICATION 26–31 (2018); Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1186–91 (2017) (examining the potential for "adjudication by algorithm" in administrative agencies); Gerald K. Ray & Jeffery S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575, 1593–1601 (2015).

C. Appellate Class Actions and Procedural Innovation

Courts may naturally resist the use of ancient writs to police complex regulatory schemes adopted by a coordinate branch of government.[308] After all, Congress and rulemaking bodies within the courts have increasingly developed clear statutes and rules that define the boundaries of federal court jurisdiction. And taken too far, novel class-wide injunctions could upset traditional requirements—finality, ripeness, and exhaustion—designed to cabin appellate review.[309] But procedural experiments may be particularly justified in two situations that have already given rise to appellate class actions: (1) when rule-makers need courts to decide important jurisdictional questions before they can create a formal rule and (2) when judges act to resolve common cases that persistently evade their jurisdiction.

By way of background, courts frequently—but not always—develop formal procedures to hear cases through advisory committees and other legislative-like processes.[310] In so doing, they hope to promote three interrelated goals. First, they protect the parties' expectations and rights, by creating formal, prospective rules informed by large numbers of constituencies.[311] Second, they promote consistent decision-making across different categories of cases before they are filed.[312] Third, they place limits on judicial power to manage and adjudicate such cases.[313]

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[308] *See, e.g.*, Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) ("[W]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." (quoting Pa. Bureau of Corr. V. U.S. Marshals Serv., 474 U.S. 34, 43 (1985))); *Pa. Bureau of Correction*, 474 U.S. at 43 ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute.").

[309] *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 175, 177–78 (1997).

[310] Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1234–43 (2012); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 893–97 (1999). *But see* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 773 (2012).

[311] *See* Bone, *supra* note 310, at 889, 935–39 ("[A] centralized, court-based, and committee-centered process is well suited for making general constitutive rules that define the basic framework of a civil procedure system and more detailed rules that control particularly costly forms of strategic behavior.").

[312] Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 698–99 (2010); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 387–88 (2010); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1893 (2002) ("If a dispute resolution system processes similar cases to disparate outcomes, there is something wrong with the process.").

[313] Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 687 (2014) ("The process . . . addresses judges in their roles as regulators of

Recently, scholars have begun to explore when "procedural experimentation" complements or frustrates the rights, rule of law, and adjudicative values served by written procedures for hearing cases and claims.[314] On the one hand, when judges can flexibly adjust rules to "fit the fuss" raised in unique and complex cases, they may promote more fairness and efficiency than the existing rules, while laying the groundwork for formalizing new ones. On the other hand, when judges rewrite rules as a case evolves, they frustrate the consistent application of law, impede parties' ability to assert their own rights, and upend rules designed to constrain judicial power.[315]

Some commentators have offered guidelines meant to limit this kind of "ad hoc" rulemaking. Given the concerns expressed above, judges arguably should avoid adopting new procedures when rule-makers have already created procedures designed to address the issue at bar.[316] They should also stick to existing procedures when a newly designed rule would upset parties' reliance interests and rights.[317]

Under this analysis, class actions pursuant to the All Writs Act provide a particularly compelling case *for* procedural innovation. The All Writs Act is a long-standing, gap-filling statute that has been strictly interpreted to avoid upsetting parties' rights or reliance interests. It has long empowered courts to issue writs and adopt procedures in aid of their jurisdiction. And courts typically only issue writs under the act when there is no procedural alternative and when necessary to protect "clear and indisputable right[s]."[318]

As it happens, the Supreme Court's first significant statement about federal appellate power to develop new judicial remedies under the All Writs Act in government challenges came nearly four years before the passage of the Administrative

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procedure as well as subjects of procedural regulation, because they too are actors in the dispute resolution system.").

[314] Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 870–72 (2018); Pamela Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 835–40 (2017); Gluck, *supra* note 40, at 1689.

[315] Bookman & Noll, *supra* note 314, at 792–95; Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 76 (1995) (fearing that broad discretion can create "arbitrary and discriminatory behavior"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426–30 (1982) (arguing that open-ended judicial discretion in case management threatens judges' impartiality).

[316] Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 54–55 (2019).

[317] *Id.* at 74 & n.327.

[318] *Cheney*, 542 U.S. at 381 (2004) (quotations marks omitted).

Procedure Act, which then explicitly incorporated rules for staying government decisions.[319] In *Scripps-Howard Radio, Inc. v. FCC*,[320] a broadcaster wanted to stay a decision by the Federal Communications Commission (FCC) that improperly rescinded its license without a hearing.[321] The FCC argued that Congress had never explicitly given courts the power to issue stays. The Supreme Court permitted the stay. Writing for the Court, Justice Frankfurter observed that "search[ing] for significance in the silence of Congress is too often the pursuit of a mirage."[322] Tracing the power to the very first Judiciary Act in 1789, Frankfurter noted that appellate courts have long possessed power under the All Writs Act "to prevent irreparable injury to the parties or to the public" as "part of [courts'] traditional equipment for the administration of justice."[323] If Congress had to itemize every permissible judicial procedure and remedy, it would "stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest."[324]

Scripps-Howard does not just show that appellate courts have innovated with ad hoc procedures to review agencies for over eighty years. *Scripps-Howard* shows how appellate courts that rely on a limited and extraordinary remedy like that afforded by the All Writs Act may even exhibit more respect for rule-makers inside and outside of the courts. Congress may hope to streamline appeals, for example, by directing an agency's errors to appellate courts in garden-variety cases. But Congress also needs courts to flexibly interpret their jurisdiction to ensure that the executive branch complies with its laws. A statute like the All Writs Act provides appellate courts with room, in extraordinary cases, to balance those competing goals. As one prominent treatise has recognized:

> One of the special advantages of review by extraordinary writ is that it is possible to respond to a perceived need to provide occasional appellate guidance on matters that often elude ordinary appeal, without establishing rules of appealability

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[319] Samuel I. Ferenc, *Clear Rights and Worthy Claimants, Judicial Intervention in Administrative Action Under the All Writs Act*, 118 COLUM. L. REV. 127, 143 (2018).

[320] 316 U.S. 4 (1942).

[321] *Id.* at 5–6.

[322] *Id.* at 11.

[323] *Id.* at 9–10.

[324] *Id.* at 15.

> that will bring a flood of less important appeals in their wake.[325]

More broadly, experiments with appellate class actions suggest two occasions that may support the use of procedural innovation in appellate courts and beyond. First, there will be times when a court cannot adopt a formal procedure without some experimentation. Second, novel procedures may be necessary to protect a court's jurisdiction over common cases and claims from delay or dysfunction.

First, courts may innovate on a case-by-case basis when open questions about their jurisdictional power cannot be resolved in a formal rulemaking process. Advisory committees in federal court, for example, have avoided developing class action rules when they simultaneously raise questions about federal courts' Article III jurisdiction. Recently, the federal advisory committee assigned to develop new class action rules in federal courts declined to make special rules preventing defendants from mooting a class by "picking off" lead plaintiffs. The federal rules committee reasoned that it could not use rulemaking to resolve those kinds of jurisdictional questions without more guidance from the Supreme Court in case-by-case adjudication. [326] More recently, an advisory committee for the U.S. Court of Appeals for Veterans Claims has benefited from incremental judgments about the court's own jurisdiction in class actions—including whether the court could find facts in mandamus petitions and whether it could exercise jurisdiction over claims not yet appealed.[327] Other courts have similarly benefited from experiments with class actions before formalizing them into a rule.[328]

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[325] WRIGHT & MILLER, *supra* note 165, at § 3934.1.

[326] Rule 23 Subcommittee Advisory Committee on Civil Rules Conference Call 107–11 (2016) (putting rulemaking questions to address "pick[ing] off" lead plaintiffs because of new questions raised by the Supreme Court's Article III jurisprudence), https://perma.cc/9AUG-2ZC6.

[327] *See* U.S. VET. APP. RULE 22(d)(1) ("In managing the litigation of a class action proceeding under this Rule, the Court may issue all orders that it deems necessary and proper."); United States Court of Veterans Claims, Misc. Order at 1, In re Rules of Practice and Procedure, Misc. No. 12-20 (Nov. 10, 2020) (noting that the rules benefitted from the "views of [the] Rules Advisory Committee); *see also supra* notes 213–37 and accompanying text; Amy B. Kretkowski, Evolution of a Class Action Rule (2019) (Power Point Presentation to the USCAVC Judicial Conference) (on file with author).

[328] For example, the U.S. Court of Federal Claims experimented with class actions for ten years before making a formal rule. *See* Kominers v. United States, 3 Cl. Ct. 684, 685–86 (1983). The court reasoned that "the better road to follow" was to hear class actions on a "case-by-case basis, gaining and evaluating experience as we study and decide the class-suit

These conclusions are at odds with the general preference that scholars have expressed for formal, prospective rulemaking in agencies.[329] But experiments with appellate class actions highlight one advantage of procedural innovation in courts. When courts adopt rules incrementally, they can answer questions about their jurisdictional power that formal rule-makers cannot while also providing them with insights and information for the future.

Second, procedural innovation may be more justified when the court seeks to protect its own jurisdiction to interpret law and award meaningful and orderly relief. This Article has argued that, at least in the review of mass adjudication systems, appellate class actions can help preserve the courts' role in our separation of powers to hear parties' claims, expound legal rules, afford relief, and ensure the executive branch faithfully executes the law. But case-by-case adjudication in a mass adjudication system can undermine all of those goals when it leads to the selective settlement of repeat claims, systemic barriers to legal access, or bureaucratic obstacles to uniform relief.

Courts may be justified in developing new procedures in other circumstances. But the idea that courts need room to experiment to review important and recurrent problems is consistent with other doctrines that govern how courts review government action. For similar reasons, courts have narrowly interpreted bars on judicial review,[330] allowed district courts to review issues collateral to statutes that channel cases from agencies into appellate courts,[331] and required "clear expression[s] of congressional

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issues presented by individual, concrete cases coming up for resolution." Quinault Allottee Ass'n & Individual Allottees v. United States, 453 F.2d 1272, 1274–76 (Ct. Cl. 1972). Similarly, after eight years, rules governing habeas proceedings were amended to reflect the Supreme Court's decision in *Harris v. Nelson*, 394 U.S. 286 (1969), that habeas courts could use the Federal Rules of Civil Procedure. *See* FED. R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 12, *reprinted in* 28 U.S.C. app. § 2254 (stating that the Federal Rules of Civil Procedure "may be applied to a proceeding under these rules"); FED. R. GOVERNING § 2255 CASES IN THE U.S. DIST. CTS. 12, *reprinted in* 28 U.S.C. app. § 2255 (same). Accordingly, many courts now certify habeas class actions under FED R. CIV. P. 23. *See, e.g.*, Reid v. Donelan, 297 F.R.D. 185, 188 n.2 (D. Mass. 2014).

329 Mulligan & Staszewski, *supra* note 310, at 1250–51 (2012); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 110 (1980); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 496 (1970); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 930–42 (1965).

330 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 488–90 (1991).

331 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209 n.11 (1994).

intent" before finding that Congress has repealed procedural tools, like class actions, to effectuate their judgments.[332] The use of novel procedural tools, like appellate class actions, is built on the same rationale as these other judicial efforts: the need for a guardrail against the careless closure of the courthouse doors.

CONCLUSION

Abstract debates about the role of judicial review in our politics cannot effectively take place without a discussion of the procedures that courts use to perform it. Even for important courts that make binding decisions for large public institutions, individualized procedures can undermine their central role to hear claims, interpret law, and provide relief to our most vulnerable.

In this way, appellate channeling statutes for public institutions share many of the same features—and raise many of the same concerns—as mandatory arbitration provisions that ban class actions against private institutions. Like arbitration, direct appellate review promises more efficient, streamlined, and final relief, sometimes by decisionmakers with expertise in a particular field.[333] But, without class actions, direct appellate review against public institutions may also depress claims, limit the relevance of precedent, and prevent parties from pooling resources they need to obtain legal representation and more systemic relief.[334]

Unlike today's modern arbitration jurisprudence, however, courts should not lightly assume that Congress intended to eliminate aggregation techniques long used to address systemic government problems when it sends cases to appellate courts. Federal courts enjoy broad authority to manage the cases that come before them as an independent, coequal branch of government. And early experiments with class actions have helped appellate judges protect their own jurisdiction to hear cases that would otherwise be frustrated by delay, poor recordkeeping, or maladministration. In this way, appellate class actions respect our

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[332] *Califano*, 442 U.S. at 699–701.

[333] Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346–52 (2011).

[334] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2812–13 (2015) (finding fewer than thirty filed arbitration claims per year over five years for millions of AT&T customers); Judith Resnik, *Fairness in Numbers: A Comment on* AT& T v. Concepcion*,* Wal–Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 133 (2011) ("[T]he providers [have] won the power to impose a mandatory, no-opt-out system in their own private 'courts" designed to preclude aggregate litigation.").

Constitutional design: ensuring courts continue to provide equal justice under the law to both big institutions and "the smaller guy."[335]

[335] Marvin Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966) (quoting Civil Rules Committee Reporter, Benjamin Kaplan) (concluding that the class action's "historic mission [was] taking care of the smaller guy").

APPENDIX A:

(Federal Statutes Channeling Review Directly into Appellate Courts)

Agency	Popular Name	Citation	Description of Action Reviewed	Original Provision Date
Commodity Futures Trading Commission	Commodity Exchange Act	7 U.S.C. § 7b	Suspensions	12/21/2000
Commodity Futures Trading Commission	Commodity Exchange Act	7 U.S.C. § 8	Denial, suspension, or revocation of designation or registration of contract market or derivatives transaction execution facility	9/21/1922
Commodity Futures Trading Commission	Commodity Exchange Act	7 U.S.C. § 10a	Orders denying designation or registration as contract market or a derivatives transaction	9/21/1922
Commodity Futures Trading Commission	Commodity Exchange Act	7 U.S.C. § 18	Orders for damages against registered persons	9/21/1922
Commodity Futures Trading Commission	Commodity Exchange Act	7 U.S.C. § 21	Orders of sanctions	9/21/1922

Commodity Futures Trading Commission, Federal Reserve	Commodity Exchange Act	7 U.S.C. § 27d	Rules and determinations regarding regulation of hybrid instruments	12/21/2000
Commodity Futures Trading Commission, Federal Reserve	Commodity Exchange Act	7 U.S.C. § 12a	Orders related to registration of commodity dealers	9/21/1922
Department of Agriculture	Packers and Stockyards Act	7 U.S.C. § 228b-3	Orders regarding live poultry dealers	8/15/1921
Department of Agriculture	Federal Seed Act	7 U.S.C. § 1600	Cease-and-desist orders	8/9/1939
Department of Agriculture	Animal Welfare Act	7 U.S.C. § 2149	Orders of violations of animal auctioning licenses	4/22/1976
Department of Agriculture	Plant Variety Protection Act	7 U.S.C. § 2461	Agency-protected plant variety decisions	4/2/1982
Department of Agriculture	Agricultural Adjustment Act	7 U.S.C. § 2621	Civil penalties for violating plans for potato handlers or importers	8/26/1982
Department of Agriculture	Egg Research and Consumer Information Act	7 U.S.C. § 2714	Civil penalties	6/17/1980

Department of Agriculture	Swine Health Protection Act	7 U.S.C. § 3804	Cease-and desist orders for failing to operate a facility to treat garbage legally	10/17/1980
Department of Agriculture	Swine Health Protection Act	7 U.S.C. § 3805	Civil penalties	10/17/1980
Department of Agriculture	Agriculture and Food Act of 1981	7 U.S.C. § 4314	Civil penalties	12/22/1981
Department of Agriculture	Honey Research, Promotion, and Consumer Information Act	7 U.S.C. § 4610	Cease-and-desist orders	10/30/1984
Department of Agriculture	Food Security Act of 1985	7 U.S.C. § 4815	Civil penalties related to pork orders	12/23/1985
Department of Agriculture	Food Security Act of 1985	7 U.S.C. § 4910	Civil penalties related to the collection of assessments on watermelons	12/23/1985
Department of Agriculture	Sheep Promotion, Research, and Information Act of 1994	7 U.S.C. § 7107	Civil penalties related to producers, feeders, importers, handlers, and purchasers of sheep and sheep products	10/22/1994

Department of Agriculture	Sheep Promotion, Research, and Information Act of 1994	7 U.S.C. § 7419	Civil penalties related to producers, handlers, and importers of an agricultural commodity	4/4/1996
Department of Agriculture	Packers and Stockyards Act	7 U.S.C. § 194	Penalties under the Packers and Stockyards Act	8/28/1958
Department of State	Immigration and Nationality Act	8 U.S.C. § 1189(c)	Department of State designations of foreign terrorist organization.	6/27/1952
Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1252(a)(1)	General orders of removal.	6/27/1952
Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1252(b)(1)-(5)	Requirements for review of removal orders.	6/27/1952
Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1252(b)(6)-(9)	Requirements for review of removal orders.	6/27/1952
Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1252(c)	Requirements for petition for review of removal order.	6/27/1952
Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1252(e)	Orders pertaining to inspection of applicants for admission.	6/27/1952

Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1324a(e)(8)	Civil monetary penalties and other orders for hiring and related violations with regard to unauthorized aliens.	6/27/1952
Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1324b(i)	Orders pertaining to unfair immigration-related employment practices.	6/27/1952
Department of Justice	Immigration and Nationality Act	8 U.S.C. § 1324c(d)(5)	Orders pertaining to document fraud.	6/27/1952
Department of Housing and Urban Development	National Housing Act	12 U.S.C. § 1701q-1	Civil monetary penalties assessed by the agency relating to supportive housing for the elderly	9/23/1959
Department of Housing and Urban Development	National Housing Act	12 U.S.C. § 1735f-14	Agency imposition of civil monetary penalties for violations by Federal Housing Act participants	6/27/1934
Department of Housing and Urban Development	National Housing Act	12 U.S.C. § 1735f-15	HUD Secretary's imposition of civil monetary penalties for violations by multifamily mortgagors	6/27/1934

National Credit Union Administration Board	Federal Credit Union Act	12 U.S.C. § 1786	Agency's orders to terminate, suspend, cease-and-desist, or other orders involving insured credit unions	8/9/1989
Federal Deposit Insurance Corporation	Federal Deposit Insurance Act	12 U.S.C. § 1817	Agency's disapproval of proposed acquisitions after hearings	9/21/1950
Board of Governors of the Federal Reserve System		12 U.S.C. § 1848	Review by parties "aggrieved by orders" of the Board	7/1/1966
Farm Credit Administration		12 U.S.C. § 2266	Decisions by Farm Credit Administration	12/10/1971
Farm Credit Administration		12 U.S.C. § 2268	Civil monetary penalties entered after an agency hearing	12/10/1971
Federal Reserve		12 U.S.C. § 3105	Foreign bank applications rejected by the Federal Reserve Board	9/17/1978
Federal Housing Finance Agency		12 U.S.C. § 4583	Final orders by the Director of FHFA	10/28/1992
Federal Housing Finance Agency		12 U.S.C. § 4623	Classifications by the director	10/28/1992

Federal Housing Finance Agency		12 U.S.C. § 4634	Orders from FHFA proceedings	10/28/1992
Consumer Financial Protection Bureau	Dodd-Frank Wall Street Reform and Consumer Protection Act	12 U.S.C. § 5563	Orders by the CFPB	7/21/2010
Federal Trade Commission, Surface Transportation Board, Federal Communications Commission, Department of Transportation, Federal Reserve	Clayton Antitrust Act of 1914	15 U.S.C. § 21	Cease-and-desist orders under Clayton Antitrust Act	10/15/1914
Federal Trade Commission	Act to Create the Federal Trade Commission	15 U.S.C. § 45	Orders to cease-and-desist from using any method of competition or act or practice	9/26/1914
Federal Trade Commission	Magnuson-Moss Warranty—Federal Trade	15 U.S.C. § 57a	Unfair or deceptive acts or practices rulemaking proceedings	9/26/1914

	Commission Improvement Act			
Small Business Administration	Small Business Investment Act of 1958	15 U.S.C. § 687a	Cease-and-desist orders for violation of Small Business Investment Act	8/21/1958
Department of Energy	Natural Gas Act	15 U.S.C. § 717r	Commission orders under Natural Gas Act	6/21/1938
Department of Energy	Federal Energy Administration Act of 1974	15 U.S.C. § 766	Rulemaking under Federal Energy Administration Act	5/7/1974
Trademark Trial and Appeal Board	Trademarks	15 U.S.C. § 1071	Board decisions on applications for registrations of marks	10/9/1962
Consumer Product Safety Commission	Flammable Fabrics Act	15 U.S.C. § 1193	Standards or regulations under the Flammable Fabrics Act	6/30/1953
Consumer Product Safety Commission	Federal Hazardous Substances Labeling Act	15 U.S.C. § 1262	Determinations that a toy presents an electrical, mechanical, or thermal hazard	7/12/1960
Consumer Product Safety Commission	Poison Prevention Packaging Act of 1970	15 U.S.C. § 1474	Packaging safety standards and regulations	12/30/1970

Consumer Financial Protection Bureau	Housing and Urban Development Act of 1968	15 U.S.C. § 1710	Orders under the Housing and Urban Development Act of 1968	8/1/1968
Department of Agriculture	Horse Protection Act of 1970	15 U.S.C. § 1825	Civil penalties under the Horse Protection Act of 1970	7/13/1976
Consumer Product Safety Commission	Consumer Product Safety Act	5 U.S.C. § 2060	Consumer product safety rules	10/27/1972
Environmental Protection Agency	Toxic Substances Control Act	15 U.S.C. § 2615	Administrative civil penalties under the Toxic Substances Control Act	10/11/1976
Environmental Protection Agency	Toxic Substances Control Act	15 U.S.C. § 2617	Waiver requests under the Toxic Substances Control Act	10/11/1976
Environmental Protection Agency	Toxic Substances Control Act	15 U.S.C. § 2618	Orders under the Toxic Substances Control Act	6/22/2016
Environmental Protection Agency	Toxic Substances Control Act	15 U.S.C. § 2622	Employee discharge or discrimination	10/11/1976
Federal Energy Regulatory Commission	Natural Gas Policy Act	15 U.S.C. § 3416	Orders under the Natural Gas Policy Act	11/9/1978

Commodity Futures Trading Commission, Securities and Exchange Commission	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010	15 U.S.C. § 8302	Commission's rulemaking proceedings related to derivatives or similar products	7/21/2010
Commodity Futures Trading Commission, Securities and Exchange Commission	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010	15 U.S.C. § 8306	Final orders with respect to a novel derivative product that may affect the other Commission's statutory jurisdiction	7/21/2010
Department of the Interior		16 U.S.C. § 79l	Decisions regarding federal employees for improvement of lands	3/27/1978
Department of Agriculture, Army, Council of Economic Advisors, Environmental Protection Agency, Department of Interior, and National Oceanic and Atmopsheric Administration	Endangered Species Act Amendments of 1978	16 U.S.C. § 1536	Exemptions granted by the Endangered Species Committee (also known as the "God Squad")	12/28/1973

Department of Energy		16 U.S.C. § 824k(i)	Orders requiring the Administrator of the Bonneville Power Administration to provide transmission service	
Department of the Interior		16 U.S.C. § 160a-1	Decisions by the Secretary to revert land from states to the United States	1/3/1983
Department of Health and Human Services		20 U.S.C. § 7973	Determinations regarding the nonsmoking policy for children's services	1/8/2002
Department of Health and Human Services	Federal Food, Drug, and Cosmetic Act	21 U.S.C. § 333(f)	Violations related to medical devices	11/28/1990
Department of Health and Human Services	Federal Food, Drug, and Cosmetic Act	21 U.S.C. § 333(g)	Direct-to-consumer advertising	9/27/2007
Department of Health and Human Services	Federal Food, Drug, and Cosmetic Act	21 U.S.C. § 335a	Review for people adversely affected by Secretary's decision regarding debarment	5/13/1992
Department of Health and Human Services	Federal Food, Drug, and Cosmetic Act	21 U.S.C. § 335b	Review for people adversely affected by Secretary's decision	5/13/1992

			regarding certain civil penalties	
Department of Health and Human Services	Federal Food, Drug, and Cosmetic Act	21 U.S.C. § 335c	Review for people adversely affected by Secretary's decision to withdraw approval of abbreviated drug applications	5/13/1992
Department of Agriculture	Poultry Products Inspection Act	21 U.S.C. § 457(d)	Secretary's determinations that markings, containers and labeling are misleading	8/18/1968
Department of Agriculture	Poultry Products Inspection Act	21 U.S.C. § 467(c)	Secretary's order with respect to withdrawal or refusal of inspection service	8/28/1957
Department of Agriculture	Meat Inspection Act/Wholesome Meat Act	21 U.S.C. § 607(e)	Secretary's determinations that markings, containers and labeling are misleading	12/15/1967
Department of Agriculture	Egg Products Inspection Act	21 U.S.C. § 1036	Secretary's determination regarding misleading labeling or containers	12/29/1979
Department of Agriculture	Egg Products Inspection Act	21 U.S.C. § 1047	Secretary's determination to refuse to provide or	12/29/1979

			withdraw inspection service.	
Federal Elections Commission	Presidential Primary Matching Payment Account Act	26 U.S.C. § 9041	Federal Elections Commission actions	10/15/1974
National Labor Relations Board	National Labor Relations Act	29 U.S.C. § 160	Orders of National Labor Relations Board remediating unfair labor practices by employer or union	7/5/1935
Department of Labor	Occupational Safety and Health Act of 1970	29 U.S.C. § 655	Health and Secretary of Labor safety rules	12/29/1970
Department of Labor, Mine Safety and Health Administration	Mine Safety and Health Act of 1977	30 U.S.C. § 811	Any rules governing substantive mine health or safety requirements	12/30/1969
Department of Labor, Mine Safety and Health Administration	Mine Safety and Health Act of 1977	30 U.S.C. § 931	Secretary's inclusion or failure to approve state worker's compensation law on a list for laws that are deemed to	12/30/1969

			provide adequate coverage	
Department of Labor, Mine Safety and Health Administration	Mine Safety and Health Act of 1977	30 U.S.C. § 953	Secretary's decisions on whether to provide funding related to state mining programs	12/30/1969
Department of Labor; Occupational Safety and Health Administration	Moving Ahead for Progress in the 21st Century Act	49 U.S.C. § 30171(b)(4)	Wrongful-discharge claims by employees providing motor-vehicle safety information	7/6/2012
Department of Labor; Occupational Safety and Health Administration	Surface Transportation Assistance Act of 1982	49 U.S.C. § 31105(d)	Improper discharge, discipline, or discrimination against employees	6/6/1983
Department of Labor; Occupational Safety and Health Administration	Aircraft Safety Act of 2000	49 U.S.C. § 42121(b)(4)	Wrongful-discharge claims by employees providing air safety information	4/5/2000
Department of Labor; Occupational Safety and Health Administration	Pipeline Safety Improvement Act of 2002	49 U.S.C. § 60129(b)(4)	Wrongful-discharge claims by employees providing pipeline safety information	12/17/2002

Department of Labor	Safe Drinking Water Act	42 U.S.C. § 300j-9	Secretary's order in response to discrimination complaint filed by an employee	11/8/1994
Department of Labor	Black Lung Benefits Act of 1973	33 U.S.C. § 921	Orders regarding black lung benefits	10/27/1973
Department of Labor	Clean Air Act	42 U.S.C. § 7622(c)	Department of Labor orders regarding employee discrimination and wrongful discharge relating to the Clean Air Act	8/7/1977
Department of Labor	Longshore and Harbor Workers' Compensation Act	33 U.S.C. § 907(j)	Secretary of Labor's decisions regarding health-care services	9/28/1984
Department of Labor, Department of Energy	PACE-Energy Act	42 U.S.C. § 5851(c)	Secretary of Labor's determinations on employee discrimination for certain licensees, applicants at the Dep't of Energy	11/6/1978

Department of Labor		49 U.S.C. § 20109(d)-(f)	Secretary of Labor's resolution of labor complaints by railroad employees about employer's discharge, discipline, discrimination, and other violations of railroad employee protections	7/5/1994
Federal Mine Safety and Health Review Commission	Mine Safety and Health Act of 1977	30 U.S.C. § 816	Orders issued by the Commission regarding wrongful discharge of mining employees for retaliation for whistleblowing complaints.	12/30/1969
GAO Personnel Appeals Board	Title 31	31 U.S.C. § 755	Final decisions of personnel corrective or disciplinary actions	9/13/1982
Department of the Treasury	Anti-Corruption Act of 1993	31 U.S.C. § 6717	Suspension of federal payments to states	9/13/1994
Environmental Protection Agency	Clean Water Act	33 U.S.C. § 1369	Rules and orders by agency about water pollution prevention and control.	10/18/1972

Department of Transportation	Deepwater Port Act of 1974, Maritime Transportation Security Act of 2002	33 U.S.C. § 1516	Secretary of Transportation's licensing decisions	1/3/1975
The Saint Lawrence Seaway Development Corporation	Saint Lawrence Seaway Act	33 U.S.C. § 988(a)	Agency orders	5/13/1954
U.S. Patent and Trademark Office	Patents	35 U.S.C. § 141	Examinations, re-examinations, post-grant decisions, inter-partes review, and deprivation proceedings	7/19/1952
Department of Veterans Affairs, Board of Veterans' Appeals	Veterans' Benefits	38 U.S.C. § 7252	Final decisions of the Board of Veterans' Appeals by the Court of Appeals for Veterans Claims	11/18/1988
Department of Veterans Affairs	Veterans' Benefits	38 U.S.C. § 7292	Decisions of the Court of Appeals for Veterans Claims by the Court of Appeals for the Federal Circuit	11/18/1988
Department of Veterans Affairs	Veterans' Benefits	38 U.S.C. § 502	Rules and regulations	8/6/1991

Department of Veterans Affairs	Veterans' Benefits	38 U.S.C. § 7263(c)–(d)	Fee agreements	11/18/1988
Department of Veterans Affairs	Veterans' Benefits	38 U.S.C. § 7422(e)	Regulations relating to collective bargaining	5/7/1991
Merit Systems Protection Board	Veterans' Benefits	38 U.S.C. § 4324(d)	Decisions by Merit Systems Protection Board	10/13/1994
Postal Regulatory Commission	Postal Service Act	39 U.S.C. § 3663	Final orders or decisions of the Postal Regulatory Commission	12/20/2006
U.S. Postal Service	Postal Service Act	39 U.S.C. § 3691	Regulations about service standards for market-dominant products	12/20/2006
Department of Health and Human Services	Clinical Laboratory Improvement Amendments of 1988	42 U.S.C. § 263a(k)	Sanctions imposed on laboratories	12/5/1967
Department of Health and Human Services	Mammography Quality Standards Act of 1992	42 U.S.C. § 263b(k)	Sanctions imposed on mammography facilities	10/9/1992
Department of Health and Human Services	Hospital and Medical Facilities	42 U.S.C. § 291h	Surgeon General's refusal to approve an application for a grant or loan	8/18/1964

	Amend-ments of 1964			
Environ-mental Pro-tection Agency	Safe Drinking Water Act Amend-ments of 1996	42 U.S.C. § 300g-1(b)(6)	Agency's deci-sion whether to comply with the maximum contaminant level	6/19/1986
Environ-mental Pro-tection Agency	Safe Drinking Water Act	42 U.S.C. § 300j-7	Drinking-water regulations	6/19/1986
Department of Health and Human Services		42 U.S.C. § 1320a-7a(e)	Civil penalties levied by the Secretary	12/14/1999
Social Secu-rity Admin-istration, Department of Health and Human Services		42 U.S.C. § 1320a-8(d)	Civil penalties levied by the Commissioner of Social Secu-rity.	12/14/1999
Department of Com-merce, U.S. Patent and Trademark Office, Nu-clear Regu-latory Com-mission		42 U.S.C. § 2182	Patent Trial and Appeal Board's deci-sions on atomic inventions	8/1/1946
Nuclear Regulatory Commis-sion, De-partment of Energy	Price-Anderson Amend-ments Act of 1988 (amend-ing the Atomic	42 U.S.C. § 2282a(c)	Findings and penalties	8/20/1988

	Energy Act of 1954)			
Department of Health and Human Services		42 U.S.C. § 3027(c), (e)	Secretary's disproval of plans for state programs on aging	10/18/1978
Department of Housing and Urban Development	Housing and Urban Development Act	42 U.S.C. § 3537a(c)	Penalties against advanced disclosure of funding decisions by the secretary	12/15/1989
Department of Housing and Urban Development	Housing and Urban Development Act	42 U.S.C. § 3545(h)	Secretary's determination that funding application disclosure requirements have been violated	12/15/1989
Environmental Protection Agency	Quiet Communities Act of 1978	42 U.S.C. § 4915	Administrator noise control decisions	10/27/1972
Department of Housing and Urban Development	Tornado Shelters Act	42 U.S.C. § 5311(c)	Termination, limitation, or reduction of community development funds by the secretary	8/22/1974
Department of Housing and Urban Development	Manufactured Housing and Improvement Act	42 U.S.C. § 5405(a)	Agency orders establishing home and safety standards	8/22/1974
Department of Energy	Alternative Motor Fuels	42 U.S.C.	Energy conservation standards by the	12/22/1975

	Act of 1988	§ 6303 (d)	secretary of Energy	
Department of Energy	Alternative Motor Fuels Act of 1988	42 U.S.C. § 6306(b)	Rules relating to energy conservation standards	12/22/1975
Department of Energy	Energy Conservation and Production Act	42 U.S.C. § 6869	Decisions by the Secretary of Energy for low-income applications for weatherization assistance	8/14/1976
Department of Housing and Urban Development, Department of Labor, Occupational Safety and Health Administration	Resource Conservation and Recovery Act	42 U.S.C. § 6971(b)	Secretary of Labor's orders to abate employee discrimination in waste services	10/21/1976
Environmental Protection Agency	Resource Conservation and Recovery Act	42 U.S.C § 6976	Disposal regulations	10/21/1976
Environmental Protection Agency	Clean Air Act	42 U.S.C. § 7412 (e)(3), (4)	Administrator's emissions standards	11/15/1990
Environmental Protection Agency	Clean Air Act	42 U.S.C. § 7421	Implementation plans for carrying out the Clean Air Act's requirements for local	11/15/1990

			governments, regional agencies, and councils	
Environmental Protection Agency	Clean Air Act	42 U.S.C. § 7525(b)(2)(ii)(B)	Suspensions or revocations of certificates of conformity for automobile engines	11/15/1990
Environmental Protection Agency	Clean Air Act	42 U.S.C. § 7607(b), (e)	Air quality, emissions, and other requirements and determinations	11/15/1990
Environmental Protection Agency	Clean Air Act	42 U.S.C. § 7661d(b)(2)	Agency denials of pollution permits such petitions are judicially reviewable	11/15/1990
Department of Energy	Uranium Mill Tailings Radiation Control Act of 1978	42 U.S.C. § 7920(a)(2)	Secretary of Energy's assessment of a civil penalty for violation of certain radiation control regulations	11/8/1978
Department of Energy	Powerplant and Industrial Fuel Use Act of 1978	42 U.S.C. § 8412(c)	Agency prohibition of particular energy sources or granting and decisions on petition for exemption	11/9/1978

Department of Energy	Power Plant and Industrial Fuel Use Act of 1978	42 U.S.C. § 8433(d)(2)(B)	Penalties for exceeding fuel use levels approved by the Secretary of Energy	11/9/1978
National Oceanic and Atmospheric Administration	Ocean Thermal Energy Conversion Act of 1980	42 U.S.C. § 9125	Orders to transfer, modify, renew, suspend, or terminate licenses	8/3/1980
Environmental Protection Agency	Comprehensive Environmental Response, Compensation, and Liability Act of 1980	42 U.S.C. § 9613	Regulations promulgated under the Comprehensive Response Compensation and Liability Act	12/11/1980
Department of Energy, Environmental Protection Agency, Nuclear Regulatory Commission	Nuclear Waste Policy Act of 1982	42 U.S.C. § 10139	Decisions related to radioactive and nuclear fuel repositories	1/7/1983
Department of Health and Human Services	Developmental Disabilities Assistance and Bill of Rights Act of 2000	42 U.S.C. § 15028	State developmental disability plan approval	10/30/2000

Railroad Retirement Board	Railroad Unemployment Insurance Act	45 U.S.C. § 355(f)	Benefit decisions for railroad employees	6/25/1938
Railroad Retirement Board	Railroad Retirement Act	45 U.S.C. §231g	Benefit decisions under the Railroad Retirement Act with the same review as under the Railroad Unemployment Insurance Act	8/16/1974
Federal Maritime Commission	Death on the High Seas Act	46 U.S.C. § 42307	Commission regulations and final orders regarding foreign shipping practices	10/6/2006
Federal Communications Commission	Communications Act of 1934	47 U.S.C. § 402	Commission's orders and decisions generally	6/19/1934
National Telecommunications and Information Administration	Middle Class Tax Relief and Job Creation Act of 2012	47 U.S.C. § 923(i)(7)	Dispute resolution board's decisions regarding disputes between federal and nonfederal entities over execution, timing, and cost of transition plans	2/22/2012
Department of Transportation		49 U.S.C. § 521(b)(9)	Penalties for violations relating to commercial motor-vehicle safety	1/12/1983

			regulations and operators	
National Transportation Safety Board		49 U.S.C. § 1153(a)-(b)	Final orders relating to aviation matters by persons with substantial interest	7/5/1994
National Transportation Safety Board		49 U.S.C. § 1153(a), (c)	Final orders relating to aviation matters by FAA Administrator	7/5/1994
National Transportation Safety Board		49 U.S.C. § 1153(a), (d)	Final orders relating to maritime matters by the Commandant of the Coast Guard	7/5/1994
Department of Transportation; Federal Motor Carrier Safety Administration	ICC Termination Act of 1995	49 U.S.C. § 13907	Transportation Secretary's orders related to complaints and investigations about household goods transportation services under authority of a motor carrier	12/29/1995
Department of Transportation		49 U.S.C. § 20114(c)	Transportation Secretary's final actions related to railroad safety	7/5/1994

Department of Transportation	Fixing America's Surface Transportation Act	49 U.S.C. § 30172(h)	Transportation Secretary's discretionary awards and decisions related to whistleblower incentives and protections relating to motor-vehicle safety	12/4/2015
Department of Transportation		49 U.S.C. § 31141(f)	Transportation Secretary's decisions related to preemption of state laws and regulations	7/5/1994
Department of Transportation; Environmental Protection Agency		49 U.S.C. § 32909	Regulations issued by Department of Transportation or Environmental Protection Agency related to automobile fuel economy	7/5/1994
Department of Transportation; Federal Trade Commission		49 U.S.C. § 32915	Transportation Secretary and Federal Trade Commission decisions involving civil penalties for automobile fuel-economy violations	7/5/1994

Department of Transportation; Federal Aviation Administration; Transportation Security Administration	Federal Aviation Act	49 U.S.C. § 46110	"[S]ecurity duties" carried out by agencies (including, most recently, "no fly list" orders).	7/5/1994
Department of Transportation	Airport and Airway Improvement Act	49 U.S.C. § 47106(c)(3)	Improvement project grant application approval conditioned on satisfaction of project requirements	9/3/1982
Department of Transportation	Airport and Airway Improvement Act	49 U.S.C. § 47111(b)(3)	Airport improvement project grant agreements	9/3/1982
Department of Transportation	Airport and Airway Improvement Act	49 U.S.C. § 47129(c)(5)-(6)	Disputes concerning airport fees	7/5/1994
Department of Transportation; Pipeline and Hazardous Materials Safety Administration	Natural Gas Pipeline Safety Act of 1968	49 U.S.C. § 60119(a)	Pipeline safety regulations or orders	8/12/1968
Department of Transportation; Pipeline	Natural Gas Pipeline Safety	49 U.S.C. § 60119(b)	Financial responsibility orders	8/12/1968

and Hazardous Materials Safety Administration	Act of 1968			
Department of Transportation; Pipeline and Hazardous Materials Safety Administration	Hazardous Materials Transportation Safety and Safety Reauthorization Act of 2005	49 U.S.C. § 5127	Actions relating to transportation of hazardous materials	8/10/2005
Department of Transportation; National Highway Transportation Safety Administration	National Traffic Motor Vehicle Safety Act of 1966	49 U.S.C. § 30161	Motor-vehicle safety standards	9/9/1966
Department of Transportation; National Highway Transportation Safety Administration	Motor Vehicle Information and Cost Savings Act	49 U.S.C. § 32503	Bumper standards	10/20/1972
Department of Transportation; Environmental Protection Agency	Motor Vehicle Information and Cost Savings Act	49 U.S.C. § 32909	Automobile-fuel-economy regulations	10/20/1972

Securities and Exchange Commission	Securities Act of 1933	15 U.S.C. § 77i	Final Commission orders	5/27/1933
Securities and Exchange Commission	Securities Exchange Act of 1934	15 U.S.C. § 78o(j)(5)	Final regulations related to hybrid products	6/6/1934
Securities and Exchange Commission	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010	15 U.S.C. § 78u-6(f)	Whistleblower determinations	6/6/1934
Securities and Exchange Commission	Securities Exchange Act of 1934	15 U.S.C. § 78y(a)	Final Commission orders under the Securities Exchange Act	6/4/1975
Securities and Exchange Commission	Securities Exchange Act of 1934	15 U.S.C. § 78y(b)	Commission rules under the Securities Exchange Act	6/4/1975
Securities and Exchange Commission	Investment Company Act of 1940	15 U.S.C. § 80a-42	Commission orders under the Investment Company Act	8/28/1958
Securities and Exchange Commission	Investment Advisers Act of 1940	15 U.S.C. § 80b-13	Commission orders under the Investment Advisers Act	8/22/1940