TESTIMONY OF JESSE PANUCCIO

Every Judge a King, Every Court Supreme: Legislative Solutions to the Continuing Problem of Non-party Relief

Hearing Before the
Committee on the Judiciary
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"Rule by District Judges II: Exploring Legislative Solutions to the Bipartisan Problem of Universal Injunctions"

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Chairman Grassley, Ranking Member Durbin, and members of the Committee: thank you for the opportunity to testify before you again today. At the outset, I should note that the views expressed in my testimony are entirely my own and do not reflect those of my law firm, any of its clients, any of my clients, or any institution or entity with which I am affiliated.

Today the Committee again considers a recurrent problem in our federal judiciary—namely, the use of the judicial power by federal district courts to grant relief to parties not before them. These courts have done so through equitable injunctions and through stays and vacatur under the Administrative Procedure Act. Such relief has been given various monikers—nationwide, universal, or even cosmic. I think these orders are most aptly labeled "non-party relief" because that term, while not as catchy, accurately describes what the courts are doing, regardless of geographic scope. As Justice Gorsuch put it, these edicts have "a court … ordering the government to take (or not take) some action with respect to those who are strangers to the suit,"[1] with "lower court judges" asserting "the authority to issue decrees that purport to define the rights and duties of sometimes millions of people who are not parties before them."[2]

This issue is no small matter. It is a question at the heart of our constitutional Republic. It is a question about democratic legitimacy and the American people's

[1] *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay).

[2] *United States v. Texas*, 599 U.S. 670, 694 (2023) (Gorsuch, J., concurring in the judgment).

control of their government. It is a question that asks whether our federal courts exist to decide cases or to advance causes. It is a question about whether judicial independence can survive when unelected, life-tenured federal district judges act like legislators or executive officials—i.e., when they purport to "govern … the whole Nation from their courtrooms."[3] As Justice Gorsuch urged back in January 2020, "it has become increasingly apparent" that the time has come to address the "important objections to this increasingly widespread practice."[4] Because the Supreme Court has refused to act after so many opportunities to do so,[5] it is time for Congress to reign in a practice that improperly renders every judge a king, and every court supreme.

I have direct experience with the problem of non-party relief issued against the government. From 2017 through 2019, I served in the Office of the Associate Attorney General, for some of that time as the Acting Associate Attorney General, ultimately responsible for much of the district court litigation at the Department of Justice. During that period, district courts issued dozens of non-party injunctions against

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[3] *Labrador v. Poe*, 144 S. Ct. 921, 926 (2024) (Gorsuch, J., concurring in the grant of stay).

[4] *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring).

[5] *See Labrador*, 144 S. Ct. at 926 (Gorsuch, J., concurring) (stating that nationwide injunctions present "a question of great significance that has been in need of the Court's attention for some time"); *id.* at 931 (Kavanaugh, J., concurring in stay of injunction); *e.g.*, *Dep't of State v. AIDS Vaccine Advocacy Coalition*, 145 S. Ct. 753, 753-54 (2025) (Alito, J., dissenting from the denial of application to vacate TRO); *Bessent v. Dellinger*, 145 S. Ct. 515, 516-18 (2025) (Gorsuch, J., dissenting from order holding application for stay in abeyance); *Texas*, 599 U.S. at 690-703 (Gorsuch, J., concurring); *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 1-2 (2023) (Kavanaugh, J., respecting the denial of application for stay.); *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring); *Hawaii*, 585 U.S. at 721 (Thomas, J., concurring).

government agencies and actors, granting relief to millions of parties not before those courts. And this was just a two-year period.

According to a report published by the *Harvad Law Review*, between 2009 and 2023, federal district courts issued 90 non-party injunctions,[6] and this figure represents only preliminary and permanent injunctions, not temporary restraining orders or nationwide vacatur under the Administrative Procedure Act's "set aside" provision, which is akin to a non-party injunction.[7] Of the 90 injunctions, 64 were issued against the first Trump Administration in just four years (over half of all such injunctions issued since 1963), while over the twelve years of the Obama and Biden administrations, there were 26 non-party injunctions.[8] According to a very conservative count by the Congressional Research Service,[9] federal district judges have issued another 17 non-party injunctions in just over two months since the start of the second Trump Administration.[10]

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[6] *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1705 (2024).

[7] *Id.* at 1704 & n.28. *See* 5 U.S.C. 706(2) ("The reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be" unlawful.).

[8] *District Court Reform*, 137 Harv. L. Rev. at 1705.

[9] Congressional Research Service, Nationwide Injunctions from January 20, 2025, Through March 27, 2025 (Mar. 28, 2025), https://www.congress.gov/crs-product/R48476. This count, for example, does not include administrative stays, vacatur under the APA, non-party injunctions with limited carveouts, multiple injunctions that operate together to universally enjoin the government action, or injunctions in class actions certified at or before the injunction's issuance.

[10] *Id.* In an unprecedented step, some district judges have begun using administrative stays to block executive actions without even considering the traditional preliminary injunction factors. *See* Christopher D. Moore, *So-Called "Administrative Stays" in Trump 2.0*, TEXAS LAW REVIEW ONLINE, Vol. 103 (forthcoming) (last revised Mar. 13, 2025), https://papers.ssrn.com/sol3/papers.cfm?a

While it appears that the federal judiciary is ideologically lopsided in its use of non-party relief,[11] these statistics show the issue is not limited to a preference for any particular substantive policy. Policies and practices that have been deemed critical to Republicans and Democrats alike have been enjoined or vacated nationwide by lone federal district judges, providing relief to millions of parties who never requested it and were not entitled to it.[12] As one law professor has put it, the "propriety of nationwide injunctions is truly a nonpartisan issue; laws, regulations, and policies

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bstract_id=5157760 (finding no instances of administrative stays issued against "executive action[s]" prior to 2022, and noting they "rest on doubtful legal authority" and "are almost certainly unlawful").

[11] *See* Appl. for Stay of Injunction at 3, *Trump v. New Jersey*, No. 25-1170 (Mar. 13, 2025) ("District courts have issued more universal injunctions and TROs during February 2025 alone than through the first three years of the Biden Administration.").

[12] *See, e.g.*, *Texas v. United States*, 86 F. Supp. 3d 591, 677-78 & n.111 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by equally divided court*, 136 S. Ct. 2271 (2016) (granting nationwide preliminary injunction against Obama Administration immigration policy); *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014) (appearing to vacate nationwide an Obama Administration healthcare regulation); *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015) (granting nationwide stay of the Obama Administration environmental regulation); *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160-61 (D. Haw. 2017) (granting nationwide temporary restraining order against first Trump Administration immigration policy); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 835 (E.D. Pa.), *aff'd sub nom. Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019) (granting nationwide preliminary injunction against first Trump Administration healthcare regulation); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 970 (D.S.C. 2018) (granting nationwide injunction against first Trump Administration environmental rule); *Texas v. United States*, 524 F. Supp. 3d 598, 667-68 (S.D. Tex. 2021) (granting nationwide preliminary injunction against Biden Administration immigration policy); *Louisiana v. Biden*, 543 F. Supp. 3d 388, 419 (W.D. La. 2021), *vacated and remanded sub nom. Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022) (granting nationwide preliminary injunction against Biden Administration environmental policy); *Pacito v. Trump*, No. 2:25-cv-255, 2025 WL 655075, at *25-26 (W.D. Wash. Feb. 28, 2025) (granting nationwide preliminary injunction against second Trump Administration immigration policy).

favored by either major party may be completely invalidated, at least for a time, by a single district judge."[13] Accordingly, the Department of Justice, across administrations and attorneys general, has consistently argued against granting relief beyond the parties to a case.[14] And jurists on both sides of the ideological divide have recognized that non-party injunctions are problematic.[15] As Justice Kagan stated in a speech, "It just can't be right that one district judge can stop a nationwide

[13] Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 6 (2019).

[14] *See* Memorandum from Attorney General Jeff Sessions to Heads of All Civil Litigating Components and United States Attorneys at 1 (Sept. 13, 2018) [hereinafter "Sessions Memo"] (noting arguments made during Bush, Obama, and first Trump administrations); United States Pet. for Writ of Certiorari at 26-31, *Dep't of Educ. v. Career Colleges and Schools of Texas*, No. 24-413 (Oct. 11, 2024) (solicitor general for President Biden arguing that "universal relief was improper"), *cert. granted*, 24-413, 2025 WL 65914, (Jan. 10, 2025); Appl. for Stay at 36-38, *McHenry v. Texas Top Cop Shop, Inc.*, No. 24A654 (Dec. 1, 2024), *granted*, 145 S. Ct. 1 (Jan. 23, 2025) (same); Appl. at 1-4, 15-20, *Trump v. New Jersey* (acting solicitor general for President Trump arguing same).

[15] *E.g.*, *Dellinger v. Bessent*, No. 25-5067, at *72-77 (D.C. Cir. Mar. 26, 2025) (Walker, J., dissenting); *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *10-17 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting); *Arizona v. Biden*, 40 F.4th 375, 394-98 (6th Cir. 2022) (Sutton, J., concurring); *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 256 (4th Cir. 2020), *reh'g en banc granted, opinion vacated*, 981 F.3d 311 (4th Cir. 2020) (Wilkinson, J., joined by Niemeyer, J.); *State of Fla. v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1284-86 (11th Cir. 2021) (Rosenbaum and Jill Pryor, J.J.); *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 393-94 (5th Cir. 2023) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 480 (2023) (Haynes, J., dissenting in part); *id.* at 394-96, 413-14 (Higginson, J., dissenting in part); *Ramos v. Wolf*, 975 F.3d 872, 902-06 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 59 F.4th 1010 (9th Cir. 2023) (Nelson, J., concurring); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 991-94 (9th Cir. 2020) (Miller, J., dissenting in part).

policy in its tracks and leave it stopped for the years that it takes to go through the normal process."[16]

The problem of overbroad injunctive relief became so pervasive in the first Trump Administration that, in September 2018, then-Attorney General Jeff Sessions issued a memorandum instructing all civil litigating components within the Department of Justice to argue in such cases for the "constitutional and prudential limitations on the remedial authority available to judges."[17] This memorandum—and a plethora of scholarship, speeches, articles, DOJ briefs, and a few judicial writings—set out the reasons why non-party injunctions and nationwide vacatur are so problematic. I will highlight some of them here.

Before I do that, let me offer one concrete example of nationwide, non-party relief. In 2017, the Department of Justice imposed new conditions on the Edward Byrne Memorial Justice Assistance Grant Program, requiring participating local jurisdictions to cooperate with federal law enforcement efforts to remove unlawfully present individuals who have committed serious crimes. The City of Chicago sued in federal district court, alleging that the conditions exceeded statutory and constitutional authority. The district court agreed with Chicago and "grant[ed] the City a preliminary injunction against the Attorney General's imposition of the notice and access conditions on the Byrne JAG grant."[18] But rather than stopping at

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[16] Josh Gerstein, "Kagan repeats warning that Supreme Court is damaging its legitimacy," POLITICO (Sept. 14, 2022), https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766.

[17] *See* Sessions Memo, *supra* note 7, at 1.

[18] *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (2017).

providing this complete relief to the only party before it, the court held: "This injunction against imposition of the … conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction."[19] No other party was before this district court, and Chicago could not make any claim that its own interests required nationwide application of the court's legal opinion. Yet the district court, with one line of reasoning, felt it appropriate to act as an arbiter for every grant applicant in the country. Keep this stark example in mind as we walk through the many ways non-party injunctions flout traditional legal norms.

I. THE PROBLEMS WITH NON-PARTY INJUNCTIONS

A. Non-party Injunctions Have No Basis in Law or History

The first problem with non-party injunctions is, as Justice Thomas has explained, they "are legally and historically dubious."[20] The Constitution grants to federal courts the power to hear "Cases" and "Controversies,"[21] which the Supreme Court has long interpreted as the power "to render a judgment or decree upon the rights of litigant parties."[22] To obtain judicial relief, a party must demonstrate it has the "irreducible constitutional minimum of standing," which the Supreme Court has explained is "an essential and unchanging part of the case-or-controversy

[19] *Id.*
[20] *Trump v. Hawaii*, 585 U.S. 667, 721 (2018) (Thomas, J., concurring).
[21] U.S. CONST. art. III, § 2.
[22] *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838).

requirement of Article III."[23] The standing requirement, as the Supreme Court has further explained, "would hardly serve [its] purpose … of preventing courts from undertaking tasks assigned to the political branches if, once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration."[24] Yet non-party injunctions "often afford relief not only to persons who are not parties to the case"—and thus have not demonstrated standing—"but even to those who would have had no standing to seek an injunction in the first place."[25] Indeed, we have even seen a district court grant an injunction to parties who have explicitly informed the court that they do not want "relief" from the challenged policy because they supported it.[26]

Moreover, as Justice Thomas has explained, the equitable authority of federal courts must come from explicit grants of power found in statute or the Constitution,

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[23] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[24] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). *See also Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) ("[S]tanding is not dispensed in gross," and a "plaintiff must demonstrate standing … for each form of relief that is sought."); *Gill v. Whitford*, 585 U.S. 48, 50 (2018) (The remedy "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.").

[25] Sessions Memo, *supra* note 7, at 3.

[26] *See* The Mayors of the Cities of Allen, Celina, College Station, Colleyville, Farmers Branch, Mason, and Midland, Texas; Pensacola, Florida; and the Former Mayor of Little Elm Texas's Motion for Leave to File a Brief as Amici Curiae, *City of Evanston v. Barr*, 412 F. Supp. 3d 873 (2019) (No. 18-4853), ECF No. 17 (filed Aug 6, 2018) (non-parties requesting court to deny unwanted relief that would extend to them); Memorandum in Support of Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, and Opposition to Plaintiffs' Motion for Summary Judgment at 29-31, *City of Evanston v. Barr*, 412 F. Supp. 3d 873 (2019) (No. 18-4853), ECF No. 78 (filed May 9, 2019) (noting that plaintiff's requested relief included parties whose position was not known or who affirmatively opposed the lawsuit).

and these grants in turn "must comply with longstanding principles of equity that predate this country's founding."[27] As my fellow witness at this hearing, Professor Bray, has so ably and exhaustively catalogued in his important scholarship on this issue, the nationwide, non-party injunction has no such lineage; it is a modern invention and thus outside the equitable power of federal courts.[28]

B. Non-party Injunctions Undermine Existing Legal Rules and Structures

The second problem with non-party injunctions is that they undermine the norms, rules, and structures that undergird our multi-court, multi-jurisdiction, multi-tiered legal system.

1. *Non-party Injunctions Prevent Percolation of Legal Issues*

One such legal norm is the concept of percolation. Our legal system is premised on the idea that percolation of legal questions among lower courts is a good thing: it leads to a fuller development of facts, a fuller consideration of arguments, and a fuller range of opinions from respected jurists across the country. As Justice Ginsburg explained, "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring pronouncement by [the Supreme] Court."[29] There are

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[27] *Hawaii*, 138 S. Ct. at 2426 (Thomas, J., concurring).

[28] *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); *see also Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 1-2 (2023) (Kavanaugh, J., statement respecting denial of stay) ("No federal statute expressly grants district courts the power to enter injunctions prohibiting government enforcement against non-parties.").

[29] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

several legal provisions and practices that reflect this preference for percolation and that permit and promote the existence of divergent judgments among the lower courts.

First, the Constitution establishes "one"—and only one—"Supreme Court and such *inferior* Courts as Congress may from time to time ordain and establish."[30] Congress has established a multi-tiered court system with specific jurisdictional reach.[31] In this hierarchical court system, one district court does not bind another, and one circuit court does not bind another.[32] It is only the Supreme Court's judgments that are binding on all federal courts. Yet nationwide, non-party injunctions by district courts effectively wield the same supremacy by stripping from other courts the efficacy of judgments in the government's favor—that is, finding that a plaintiff has no entitlement to relief.[33] For the federal government to maintain a

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[30] U.S. CONST. art. III, § 1 (emphasis added).

[31] *See* 28 U.S.C. §§ 41, 81-132, 1251-1413.

[32] *See, e.g.*, *Fishman & Tobin, Inc. v. Tropical Shipping & Constr.*, 240 F.3d 956, 965 (11th Cir. 2001); *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001).

[33] Non-party injunctions issued during both the first Trump Administration and the Biden Administration illustrate the point.

During the first Trump Administration, a federal district court in Maryland held that the Department of Homeland Security's recission of the Deferred Action for Childhood Arrivals (DACA) policy was lawful, thus denying to the plaintiffs in that case their requested relief. *See Casa de Md. v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018). No matter, however, because two other federal district courts had already issued nationwide, non-party injunctions granting these plaintiffs the very relief they could not achieve in the actual lawsuit they filed. *See id.* at 767.

During the Biden Administration, a federal district court in Texas issued a nationwide stay that suspended the Food and Drug Administration's approval of the abortion drug, mifepristone. *All. For Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 560 (N.D. Tex. 2023). Hours later, a federal district court in Washington issued a preliminary injunction barring the FDA from changing its approval in seventeen

policy, then, it faces the potential of having to run the table before more than one-thousand district judges (active and senior), and if even *one* of those judges disagrees, he sets the law of the land for the entire nation—and may even override the decisions of circuit courts of appeal that rule in favor of the government. The nationwide, non-party injunction thus simultaneously makes every court supreme and every court a potential nullity.

Second, our legal system's judgment preclusion rules express a preference for percolation. Nonmutual collateral estoppel does not apply against the federal government. In other words, unlike private parties, the government is not forever bound by a single lower court's decision on a legal issue; it can relitigate, with new plaintiffs, issues already decided by a court in a prior lawsuit with other plaintiffs. The Supreme Court has explained that the alternative "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."[34] Yet courts issuing nationwide, non-party relief are ignoring this rule altogether and producing the exact situation the Supreme Court has cautioned against.

Third, Supreme Court Rule 10 also expresses a preference for percolation. It states, as the very first reason the Court might agree to hear a case, that "a United States court of appeals has entered a decision in conflict with the decision of another

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states and the District of Columbia. *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023).

[34] *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

United States court of appeals on the same important matter."[35] Yet nationwide injunctions typically cut off the possibility of such circuit splits because, once relief is granted nationwide, there is no need for other plaintiffs or other courts to proceed. Instead, the executive branch, if it believes the enjoined policy is important, is forced to seek emergency relief from the Court of Appeals or the Supreme Court, often on an expedited basis and with an underdeveloped record. Justice Sotomayor has noted that, in the wake of these many non-party injunctions, there is "a now-familiar pattern. The Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not."[36]

Casting aside these longstanding rules and norms that promote percolation, the nationwide, non-party injunction is fundamentally altering our legal and political system. For every hot-button policy issue, parties opposing the government's position forum shop for a single judge who will see the law their way. This lone district judge—one of 600-plus active judges and 400-plus senior judges—overrides the judgment of the elected branches and creates a new rule to govern us all, achieving what even a single Supreme Court justice could not on his or her own. The executive branch, rightly thinking that the elected branches should make national policy, then quickly moves up the appellate ladder without any of the benefits of percolation our judicial system relies upon for reasoned decisionmaking.

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[35] Rules of the Supreme Court, at 5-6 (Jan. 1, 2023), https://www.supremecourt.gov/filingandrules/2023RulesoftheCourt.pdf.

[36] *Wolf v. Cook County, Illinois*, 140 S. Ct. 681, 681-84 (2020) (Sotomayor, J., dissenting from the grant of stay).

2. *Non-party Injunctions Circumvent the Class-Action System's Safeguards*

Aside from undermining the percolation norm, non-party injunctions also circumvent the specific legal rules and procedures that have been established to offer efficiency, relief, and finality to numerous parties with common interests: the class action. Some argue that nationwide injunctions are necessary to achieve national uniformity and complete relief. But this is the very purpose of the class action.[37] And the class action system, governed by statutes and the Federal Rules of Civil Procedure, has safeguards to ensure the appropriateness of class-wide relief, the adequacy of representation, the rights of class members, and the rights of the defendant. The class action also equalizes the risk of litigation: the judgment is as binding on the class as it is on the government. Non-party injunctions whistle past this entire, carefully calibrated system, sweeping in *all* parties, regardless of whether they have standing or meet the requirements of Rule 23.[38] And they permit the government no finality and bind the plaintiff class not at all: the government must

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[37] *See* FED. R. CIV. P. 23(b)(2) ("A class action may be maintained if Rule 23(a) is satisfied and … the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.").

[38] The non-party injunction also circumvents the statutes and rules establishing efficient procedures for multidistrict litigation. Under 28 U.S.C. § 1407, "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."

run the table while plaintiffs can simply keep suing in court after court until they find a single judge who is willing to grant non-party relief.

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Cataloguing the several legal rules, processes, and norms that non-party injunctions undermine leads to an inescapable conclusion: it is usually an act of judicial overreach for a single federal district court to apply its judgment to nonparties, especially nationwide. In effect, that court is telling every other court that its judgments do not matter and that the rules and norms that have long structured our judicial system do not apply.

3. *Non-party Injunctions Transform Courts into Political Actors, Undermine Democratic Norms, and Erode Confidence in, and the Independence of, the Judiciary*

The third problem with non-party injunctions flows directly from the first two. Because these injunctions have no basis in law, because they affirmatively flout several legal rules and norms, and because they cast aside Congress's authority to set the jurisdiction of inferior courts and the executive's authority to determine how to apply a lower court decision,[39] it is—in the words of Justice Gorsuch—"hard to see how the court [granting non-party relief] could still be acting in the judicial role of resolving cases and controversies."[40] Indeed, far from deciding concrete controversies between actual parties before the courts, judges issuing nationwide, non-party injunctions seem to be acting as Councils of Revision, roving across the Federal

[39] *See* Sessions Memo, *supra* note 7, at 6.
[40] *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring).

Register to assess the legality of executive action before it can take effect. But our Constitution's Framers affirmatively rejected the idea, proposed at the Philadelphia Convention, that the "Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people."[41] Recall my example from earlier—the district court in Chicago that held that its ruling with respect to one city's grant application should apply nationwide because there was "no reason to think that the legal issues present in this case … would differ in another jurisdiction."[42] This is precisely what a Council of Revision would have done. But it is not what the "inferior Courts" established by our Constitution are supposed to do.

The nationwide, non-party injunction is an act of national policymaking, and that is a role reserved, in our constitutional system of popular sovereignty, to the elected branches of Congress and the President. And it is worth noting, at this Congressional hearing, that although the many non-party injunctions of late have been issued to restrain agency rules and policies, those injunctions are ultimately aimed at Congress—because it is only from Congress's delegated lawmaking authority that executive agencies can promulgate regulations and policies that have the force of law. Some have argued that nationwide, non-party relief is a necessary check on the ever-growing power of the executive branch's administrative agencies.[43]

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[41] 2 *The Records of the Federal Convention of 1787*, at 73-80 (Max Farrand ed., 1911).

[42] *City of Chicago*, 264 F. Supp. 3d at 951.

[43] *See* Amanda Frost, *Academic highlight: The debate over nationwide injunctions*, SCOTUSBLOG (Feb. 1, 2018, 10:21 AM), https://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions/ (citing Suzette M.

But, as with so many of the ills that arise from Congress's excessive delegations of lawmaking power to the administrative state, the answer is not to fix one constitutional distortion by creating another. Rather, if the concern is with the power of the administrative state, then the answer is for Congress to reassert its atrophied policymaking muscle, not to transform the judiciary into a third political branch.

Our Founders envisioned the judiciary as "the least dangerous branch to the political rights of the Constitution."[44] Hamilton reasoned that while "individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter."[45] But he added a critical caveat: "so long as the judiciary remains truly distinct from both the legislature and the executive."[46] Chief Justice Marshall similarly cautioned that "[i]f the judicial power extended to every question under the laws of the United States[,] [t]he division of power [among the three branches] could exist no longer, and the other departments would be swallowed up by the judiciary."[47] Thus, *Marbury v. Madison* made clear the Court was adjudicating only Mr. Marbury's *individual* right to his commission and not a broader "political" subject, because the "province of the court is, *solely*, to decide on the rights of individuals, not to enquire how the executive, or executive officers,

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Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017)).

[44] The Federalist No. 78.

[45] *Id.*

[46] *Id.*

[47] Jonathan Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After Massachusetts and Hein*, 20 Regent U. L. Rev. 175, 180-81 (2008) (quoting Chief Justice Marshall's papers).

perform duties in which they have ... discretion."[48] When federal district judges range beyond granting relief to the individuals before them and make nationwide policy, they obliterate the distinction between courts of justice and the legislative and executive branches.

The more life-tenured judges act like policymakers, the less confidence the public will have in federal courts. History has shown the American people have a stubborn tendency to demand a say in the rules that govern their lives. One of the virtues of our system is that we may rid ourselves of our elected officials every few years if we do not like them. But not federal judges. They have life tenure. And that lifetime share of the governing power means federal judges *must* be modest in their application of that power. Humility is a necessary judicial virtue. But, in recent years, the third branch has lost all sense of itself; it will either rediscover judicial humility or lose the support of the People and force a constitutional crisis. Of late, we have heard much about how criticism of judges can undermine respect for the judiciary. The judiciary itself frequently offers this warning in response to criticism. It is, no doubt, a very important point. But it is also incumbent upon a judiciary that wants to avoid the rough-and-tumble of politics to refrain from injecting itself into

[48] 5 U.S. (1 Cranch) 137, 166 (1803) (emphasis added).

our nation's political life by reaching beyond the cases and parties that come before it.

II. THE SOLUTION TO NON-PARTY INJUNCTIONS

The Supreme Court, of course, could reign in the inferior members of its branch and put a stop to the issuance of non-party relief. But time and again, the Supreme Court has refused to act, despite the statements of individual justices and the repeated pleas from solicitors general of both parties. Perhaps the Court's inaction ultimately reflects human nature and political reality: as the Founders understood, those in power inevitably seek "concentration" of their power.[49] The Constitution's answer to that reality is a divided system of government in which each branch checks the others, such that "[a]mbition … counteract[s] ambition."[50] The federal judiciary has been, to put it mildly, overly ambitious in recent years; it is time for Congress to counteract the third branch's ambition through legislation.

Three legislative fixes seem advisable. Before I get to those, however, I caution against one potential legislative solution that has been proposed in recent years: assigning three-judge panels to cases seeking nationwide relief. This solution does little to fix the problems identified earlier. Having three out of one-thousand district judges exercise non-judicial power over non-parties is not materially better than having one out of one-thousand judges do so. The Constitution provides that there is "one supreme Court."[51] That is the Court with the power to issue rulings with

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[49] Federalist No. 51.
[50] *Id.*
[51] U.S. CONST., art. III, § 1.

nationwide precedential effect, not the "inferior Courts." Moreover, creating a procedure for nationwide relief at the trial level would normalize and encourage a practice that has no historical foundation and is generally deleterious to our system of divided powers. The legislative fix for non-party injunctions should not be a procedure that encourages more of them.

Now for the three actions Congress should take. First, Congress should amend the necessary federal statutes to make clear that federal district courts do not have the power to grant relief to non-parties. This legislative fix should include removing the "set aside" language in 5 U.S.C. 706(2) and making necessary revisions to 5 U.S.C. § 705 to clarify that stays are limited to parties before the Court.

Second, it appears that the latest trend in nationwide relief is for district courts to issue temporary restraining orders (TROs) or administrative stays instead of preliminary injunctions. Federal district judges who believe their edicts should apply nationwide are probably not keen on having those edicts overturned, so they have an incentive to disguise preliminary injunctions as non-appealable orders. Congress should amend 28 U.S.C. § 1292 to ensure that TROs, or any other orders that have the effect of enjoining federal governmental action actions, are immediately appealable.

Third, even if Congress enacts the above fixes, it is likely that judges who believe they should have nationwide power will shift from granting non-party injunctions to certifying classes and then granting injunctive relief to the class under Federal Rule of Civil Procedure 23(b)(2). Such certifications will likely be of dubious

validity,[52] but even if proper, they will still result in a single federal district judge overriding the choices of the branches empowered to make nationwide policy. Thus, there should be an avenue through which the Attorney General may obtain mandatory merits review by the Supreme Court. Congress should consider imposing mandatory jurisdiction on the Supreme Court for any injunction (or like order) that the Attorney General certifies as an emergency.[53]

There is ample historical precedent for such a law. For example, from 1937 through 1976, federal statutes required the Supreme Court to hear appeals from any order granting or denying a preliminary or permanent injunction involving a constitutional challenge to a federal statute.[54] In fact, the Supreme Court is still

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[52] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (quotation marks omitted).

Just last week, the D.C. Circuit, over a dissent by Judge Walker, refused to stay "extraordinary injunctions" where the district court first "granted a temporary restraining order preventing the removal of the named plaintiffs, then quickly certified a class" defined as everyone affected by the Proclamation, "and then granted a temporary restraining order that enjoined the Government from removing members of that class." *J.G.G. v. Trump*, No. 25-5067, at 74 (D.C. Cir. Mar. 26, 2025) (Walker, J., dissenting) (quotation marks and bracket omitted). As Judge Walker observed, the "type of challenge" brought in the complaint is "unique to each plaintiff, so it would seem that a class action is a poor vehicle for that type of challenge." *Id.* at 80 n.34.

[53] *Cf.* 42 U.S.C. §§ 2000a–5, 2000e–6 (authorizing mandatory, direct appeals to the Supreme Court in certain actions brought by the Attorney General, when the Attorney General certifies "the case is of general public importance").

[54] Act of Aug. 24, 1937, ch. 754, 50 Stat. 752 (previously codified at 28 U.S.C. § 2282). In 1976, Congress eliminated direct appeals to the Supreme Court for injunctions against federal legislation. *See* Act of Aug. 12, 1976, Pub. L. No. 94-381, § 2, 90 Stat. 1119 (repealing 28 U.S.C. § 2282). *See generally* 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 4040, 4234 (3d ed.).

required to hear direct appeals from cases assigned to a three-judge district court,[55] such as apportionment cases.[56] And as recently as 2002, Congress expanded the Supreme Court's mandatory appellate jurisdiction to include constitutional challenges to campaign finance laws.[57]

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Chairman Grassley, Ranking Member Durbin, and Members of the Committee: thank you, again, for the opportunity to testify today.

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[55] 28 U.S.C. § 1253; *see* Supreme Court Rule 18 (governing "direct appeal from a United States district court"). *See, e.g.*, 2 U.S.C. § 922 (providing mandatory appellate jurisdiction for certain actions raising claims related to emergency powers to eliminate budget deficits); 26 U.S.C. §§ 9010, 9011 (same for certain actions seeking declaratory or injunctive relief brought by the Federal Election Commission); 47 U.S.C. § 555 (same for any civil action challenging the constitutionality of 47 U.S.C. §§ 534 or 534, which require cable operators to carry certain television stations); 52 U.S.C. §§ 10101, 10303, 10304, 10306, 10504 (same for certain proceedings related to voting rights, literacy tests, changes to voting qualifications, or poll taxes); 52 U.S.C. § 10701 (same for actions brought by the Attorney General to enforce the Twenty-Sixth Amendment).

[56] 28 U.S.C. § 2284; *see, e.g.*, *Gill*, 585 U.S. at 56, 60 (challenging state redistricting plan).

[57] Pub. L. No. 107-155, § 403(a)(1), (a)(3), 116 Stat. 81, 113 (Mar. 27, 2002) (codified at 52 U.S.C. § 30110 (notes)); *see, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 196 (2014).