GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

HEARING BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE

February 25, 2020

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Introduction

Chairman Graham, Ranking Member Feinstein, and distinguished Members of the Committee, thank you for the opportunity to appear before you today to present the views of the Office of the Attorney General for the District of Columbia on the role of nationwide injunctions.

As the Solicitor General of the District of Columbia, I defend the District's laws and regulations against administrative and constitutional challenges and represent the District's interests in affirmative litigation. In these dual roles, the Office of the Attorney General for the District of Columbia finds itself both opposing injunctions against our laws and, in appropriate circumstances, seeking injunctive relief against private parties or the federal government. Based on the District's experience, the answer to the question of when nationwide injunctions are appropriate is neither "always" nor "never"; instead, the propriety of a nationwide injunction depends on the circumstances of the particular case. In what follows, I first outline the District's position on why nationwide injunctions are appropriate in certain circumstances, and then respond to some of the common counterarguments against their use.

Understanding Nationwide Injunctions

For impact litigators, nationwide injunctions are a tool to secure meaningful relief for plaintiffs and respond to fast-moving situations where it is not feasible to proceed expeditiously on a class-wide basis. Nationwide injunctions have a sound basis in history and the Constitution, and they are often necessary to secure complete relief for the plaintiffs in a particular case.

Nationwide injunctions are consistent with well-settled principles of equitable relief. Injunctive relief sounds in equity. District courts enjoy "sound discretion to consider the necessities of the public interest when fashioning injunctive relief," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (internal quotation marks omitted), and "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

District courts have never been limited to exercising the judicial power within geographical boundaries. It has long been understood that "a court of equity acts *in personam*." *Hart v. Sansom*, 110 U.S. 151, 155 (1884); *see* John H. Langbein, et al., History of the Common Law: The Development of Anglo-American Legal Institutions 286 (2009). Accordingly, the Supreme Court

has confirmed that a "District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952); *see Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932) (holding that an injunction "bound the respondent personally . . . not simply within the District of Massachusetts, but throughout the United States"). That is to say, historically, a district judge has not been confined to the limits of the court's jurisdiction in awarding injunctive relief.

What is more, as the doctrine of collateral estoppel illustrates, there is nothing exceptional about a district court's fashioning relief with an effect beyond its geographical limits. *See* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 640-41 (2017) (hereinafter, "Morley, *Nationwide Injunctions*") (noting that "[t]he res judicata effect of a judgment is not subject to geographic limits"); 28 U.S.C. § 1738 (mandating that a judgment shall have preclusive effect when the rendering court is a state court and the second tribunal is a federal court); *see also, e.g.*, *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

Collateral estoppel principles—in particular, the use of non-mutual collateral estoppel—also demonstrate that one court's judgment may apply beyond the particular parties to the case. If one court issues a judgment in favor of the plaintiff and against the defendant, another plaintiff may seek to invoke offensive non-mutual collateral estoppel against that same defendant in a subsequent case. It is thus not unusual that the outcome of one case might, in appropriate circumstances, dictate the outcome for other parties.

With regard to injunctive relief, it is noteworthy that the Supreme Court has permitted broad prophylactic injunctions that remedy more than the specific harm a particular plaintiff has alleged. *See* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buff. L. Rev. 301, 313-14 (2004) (noting that federal courts have applied prophylactic remedies in cases involving "constitutional rights, sexual harassment, prison conditions, abortion rights, and economic regulation"). In *Brown v. Plata*, 563 U.S. 493 (2011), the Court affirmed an injunction compelling California to reduce its prison population. *Id.* at 545. The purpose of the injunction was not only to redress the prisoner-plaintiffs' harm, but also to redress the conditions creating an "extensive and ongoing constitutional violation." *Id.* Thus, the effect of the injunction was to protect other—non-party—prisoners from experiencing the same conditions. *Id.* at 531-32 (reasoning that the injunction "does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class" and "[r]elief targeted only at present members of the plaintiff classes may [] fail to adequately protect future class members"); *cf. Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) ("Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" (quoting *Milliken v. Bradley*, 433 U.S. 267, 281 (1977))).

Indeed, while a few members of the current Supreme Court have expressed concern about the use of nationwide injunctions, the Court has issued "universal" injunctions as far back as 1913.

Journal of Commerce & Commercial Bulletin v. Burleson, 229 U.S. 600, 601 (1913) (per curiam). In *Burleson*, the Court temporarily enjoined a federal statute from being enforced not just against the plaintiffs but also against "other newspaper publishers," before the Court issued a final decision in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913). 229 U.S. at 600. The Court has thus long recognized that the judicial power may be exercised to provide relief to nonparties. *See* Mila Sohoni, *The Lost History of The "Universal" Injunction*, 133 Harv. L. Rev. 920, 924, 944-46 (2020).

Nationwide injunctions are consistent with the Administrative Procedure Act. In the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, Congress provided, and courts have consistently recognized, that the proper remedy for an APA violation is to set aside the agency rule or decision altogether. 5 U.S.C. § 706(2) (instructing that "[t]he reviewing court shall . . . hold unlawful and *set aside* agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (emphasis added)); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." (internal quotation marks omitted)); *see Pennsylvania v. President U.S.*, 930 F.3d 543, 575 (3d Cir. 2019) ("Congress determined that rule-vacatur was not unnecessarily burdensome on agencies when it provided vacatur as a standard remedy for APA violations."), *cert. granted*, No. 19-454, 2020 WL 254168 (Jan. 17, 2020); *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 512 (9th Cir. 2018) (observing that nationwide relief "is commonplace in APA cases"), *cert. granted*, 139 S. Ct. 2779 (2019). Accordingly, if a district court determines that an agency's rule is "*facially* invalid, then the appropriate remedy under the APA is for the court to prohibit the rule's applicability in any and all circumstances, a ruling that unavoidably redounds to the benefit of parties 'not before the court.'" *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 67 (D.D.C. 2019) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting)).

Nationwide injunctions are consistent with the rule of law. Nationwide injunctions can be a way of carrying out the courts' responsibility to uphold the rule of law. Our legal system implements the fundamental principle that similarly situated individuals should be treated alike. District courts have recognized that where a case "concerns a single decision on a nationwide policy" affecting a particular group, rather than "case-by-case enforcement of a particular policy or statute," nationwide injunctive relief may be appropriate. *Saget v. Trump*, 375 F. Supp. 3d 280, 379 (E.D.N.Y. 2019) (enjoining rescission of Temporary Protected Status for Haitians); *see Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018) ("Because the decision to rescind the [Deferred Action for Childhood Arrivals ("DACA")] program had a systemwide impact, the court will preliminarily impose a systemwide remedy." (internal quotation marks omitted)), *cert. before judgment granted sub nom. McAleenan v. Vidal*, 139 S. Ct. 2773 (2019). When a case poses a nationwide question that distinctly affects a discrete group, a nationwide answer may be appropriate.

The Supreme Court recently endorsed this approach. After finding that President Trump's March 16, 2017 executive order barring entry of nationals of six predominantly Muslim countries to the United States likely violated the Establishment Clause, a district court in Maryland entered, and the U.S. Court of Appeals for the Fourth Circuit upheld, a nationwide preliminary injunction

against enforcement of the travel ban. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565-66 (D. Md. 2017), *aff'd in part, vacated in part*, 857 F.3d 554, 604-06 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (2017). The Supreme Court declined to stay the preliminary injunction as it applied to individuals "similarly situated" to the plaintiffs. 137 S. Ct. 2080, 2088 (2017) (per curiam). In other words, the Court allowed the injunction to apply not just to the plaintiffs, but to foreign nationals who demonstrated "a credible claim of a bona fide relationship with a person or entity in the United States." *Id.*

A court should be reluctant to allow similarly situated individuals to suffer from conduct it has already found to be unlawful. When there is no legal authority to support an agency decision or executive order and that defect is present in all jurisdictions, courts would be remiss to permit legally unsupportable conduct to continue to harm individuals and entities across the country. In this vein, in a recent challenge to the U.S. Attorney General's imposition of immigration-related conditions on public-safety grants under the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne-JAG"), a district court determined that a nationwide preliminary injunction was proper because "[t]he rule of law is undermined where a court holds that the Attorney General is likely engaging in legally unauthorized conduct, but nevertheless allows that conduct in other jurisdictions across the country." *City of Chicago v. Sessions*, No. 17-CV-5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *reh'g en banc vacated*, Nos. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

Nationwide injunctions may be necessary to grant compete relief to the plaintiffs in particular circumstances. Opponents of nationwide injunctions argue that a court should only award relief to the parties before it, but there are myriad circumstances where awarding complete relief to a plaintiff requires action beyond the court's geographic boundaries or against third parties. A few illustrative examples:

- *Where the plaintiffs do not all reside in the jurisdiction where the suit is brought, injunctive relief must go beyond the court's geographical boundaries.* After the U.S. Department of Homeland Security decided to terminate Temporary Protected Status ("TPS") for individuals from Haiti residing in the United States, a group of affected plaintiffs brought suit in the U.S. District Court for the Eastern District of New York. *Saget*, 375 F. Supp. 3d at 328-29. Many of those plaintiffs lived in New York, but not all. In granting a nationwide injunction against rescission of TPS for Haiti, the district court observed that limiting the injunction to the parties "would not adequately protect the interests of all stakeholders" given that plaintiffs "not only include[d] residents of New York but also individuals and a nonprofit entity based in Florida." *Id.* at 379.

- *Where a plaintiff's harm is not contained to the judicial district in which the suit is brought, nationwide injunctive relief may be appropriate*. When Washington State and Minnesota challenged the President's initial travel ban, they argued that a nationwide injunction was necessary to ensure that their affected residents and those traveling to meet them were not stopped at ports of entry outside the states' boundaries. The U.S. Court of Appeals for the Ninth Circuit agreed, explaining that

> even if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the [temporary restraining order] that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders.

Washington v. Trump, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam). The only way to afford complete relief to the plaintiffs in that case was to ensure that the injunction was nationwide in scope.

- *Some harms cross boundaries.* Courts have also found nationwide injunctions necessary where the harm at issue transcends jurisdictional borders. *See, e.g.*, *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 969 (D.S.C. 2018) (entering nationwide injunction barring the Environmental Protection Agency and the Army Corps of Engineers from implementing a rule suspending the 2015 Clean Water Rule, reasoning that the Suspension Rule "affects a vast array of wetlands across the United States" and that plaintiffs provided affidavits indicating that the rule "will affect downstream waters not just in South Carolina or even within the Fourth Circuit but throughout the United States"). In cases involving natural resources, endangered species, and food and drugs, cabining injunctive relief to only the parties or a limited geographical area will not completely solve the harm. *Cf. Plata*, 563 U.S. at 545.

- *Some rights are indivisible.* Some rights are indivisible, in which case granting relief to one plaintiff necessarily affects third parties. Classic examples are desegregation and reapportionment cases. Morley, *National Injunctions*, 97 B.U. L. Rev. 615 at 646 n.184 ("In cases involving 'indivisible' rights, such as the right to a desegregated school system or legislative districts of equal population size, it is impossible to grant relief just to a single plaintiff without effectively granting relief to all other affected right holders. Thus, to comply with a Plaintiff-Oriented Injunction concerning indivisible rights, government defendants would also have to enforce the rights of third-party nonlitigants (at least so long as the plaintiff retains standing to continue enforcing the injunction)." (citation omitted)).

Nationwide injunctions can serve judicial economy. The ability to order nationwide relief promotes judicial economy. Courts reason that "systemwide injunctions can prevent a 'flood of duplicative litigation' by allowing similarly situated non-party individuals to benefit from an injunction rather than filing separate actions for similar relief." *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 24 (D.D.C. 2018) (quoting *Nat'l Mining Ass'n*, 145 F.3d at 1409), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019) (per curiam). For example, after the U.S. Attorney General imposed the aforementioned immigration-related conditions on the Byrne-JAG program, several states and cities filed suit in courts across the country. In considering one challenge, the U.S. Court of Appeals for the Seventh Circuit noted that 14 states and the District of Columbia, 37 cities and counties, and the United States Conference of Mayors on behalf of its 1,400 member cities had participated as *amici curiae* or sought to intervene to support an injunction against the conditions. *City of Chicago*, 888 F.3d at 292. Under the circumstances, the court determined that "[t]he district court appropriately held that judicial economy counseled against requiring all of

those jurisdictions, and potentially others, from filing individual lawsuits to decide anew the narrow legal question in this case." *Id.*

Nationwide injunctions are especially useful in immigration cases, where the uniform application of federal law is a paramount consideration. Under the Constitution, "Congress shall have Power . . . [t]o establish [a] uniform Rule of Naturalization . . . throughout the United States." U.S. Const. art. I, § 8, cl. 4. Congress has done so, and it has directed that "the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384. Courts have heeded Congress's message and used nationwide injunctions as a way to ensure uniformity in the enforcement of immigration laws. *See Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (affirming nationwide injunction against the Deferred Action for Parents of Americans and Lawful Permanent Residents program), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam); *Regents of Univ. of Cal.*, 908 F.3d at 511-12 (affirming nationwide injunction against rescission of the DACA program). Additionally, as noted *supra* pp.4-5, geographically limited injunctions are ineffective in immigration-related cases because there are multiple ports of entry and it is easy to move among the states. *Texas*, 809 F.3d at 188; *Washington*, 847 F.3d at 1167.

Responding To Criticisms About Nationwide Injunctions

Critics of nationwide injunctions frequently argue that they will prevent the percolation of legal issues through the federal courts, encourage forum-shopping, and create the possibility of conflicting injunctions. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 457-65 (2017) (hereinafter "Bray, *Multiple Chancellors*"). In the District of Columbia's experience, those concerns prove more illusory than real. In addition, some critics of nationwide injunctions contend that class actions are an adequate substitute for injunctive relief at a national level. Here again, these critics miss the mark.

Recent cases demonstrate that issues are percolating despite nationwide injunctions. To be sure, the percolation of legal issues through the courts is an important function, but there is little indication from recent cases that the issuance of nationwide injunctions is stymieing percolation. A few examples suffice.

- *DACA.* A Maryland district court upheld the rescission of the DACA program even after district court judges in California and New York issued nationwide injunctions preliminarily enjoining the program's rescission and appellate review of those rulings was pending. *Compare Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048-49 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019), *and Batalla Vidal*, 279 F. Supp. 3d at 437-38, *with Casa de Md. v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 779 (D. Md. 2018), *aff'd in part, vacated in part, rev'd in part*, 924 F. 3d 684 (4th Cir. 2019).

- *Travel ban.* Despite an early nationwide injunction against President Trump's travel ban, courts across the country considered multiple challenges to various iterations of the executive order and awarded different forms of relief. After plaintiffs challenged President Trump's January 27, 2017 executive order, a Washington State district court entered a

nationwide temporary restraining order, *Washington v. Trump*, No. 17-CV-141, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017), whereas a Virginia district court limited its award of preliminarily injunctive relief to Virginia residents and employees and students of state educational institutions in Virginia, *Aziz v. Trump*, 234 F. Supp. 3d 724, 738-39 (E.D. Va. 2017), and a Massachusetts district court declined to impose any injunctive relief or to extend its temporary restraining order, *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 38 (D. Mass. 2017).

Following President Trump's March 16, 2017 executive order, a Hawaii district court issued a nationwide temporary restraining order, which it later converted into a preliminary injunction, barring enforcement of the travel ban and suspension of the refugee admissions program, *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017) (temporary restraining order); 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017) (preliminary injunction), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir. 2017) (per curiam), *vacated and remanded*, 138 S. Ct. 377 (2017), while a Maryland district court preliminarily enjoined on a nationwide basis only the travel ban, *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 565, and a Virginia district court denied injunctive relief altogether, *Sarsour v. Trump*, 245 F. Supp. 3d 719, 742 (E.D. Va. 2017).

And following President Trump's September 24, 2017 proclamation, a Maryland district court preliminarily enjoined enforcement of the travel ban on a nationwide basis except with regard to "[i]ndividuals lacking a credible claim of a bona fide relationship with a person or entity in the United States," *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir. 2018) (en banc), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018), and a Hawaii district court issued a nationwide temporary restraining order, *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160-61 (D. Haw. 2017), later converted into a preliminary injunction, which the Ninth Circuit limited in scope to "those persons who have a credible bona fide relationship with a party or entity in the United States," 878 F.3d 662, 702 (9th Cir. 2017) (per curiam), *rev'd and remanded*, 138 S. Ct. 2392 (2018).

Thus, by the time the travel ban reached the Supreme Court, it had percolated through multiple district and circuit courts, thereby providing the Supreme Court with a thorough discussion of the issues.

- *Public charge.* The same is true of the multiple challenges pending against the rule revising the definition of "public charge" for purposes of inadmissibility under the Immigration and Nationality Act. District courts in Maryland, New York, and Washington issued nationwide preliminary injunctions against enforcement of the rule, *Casa de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 786-87 (D. Md. 2019), *stay pending appeal granted*, No. 19-2222, Dkt. 21 (4th Cir. Dec. 9, 2019); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 352-53 (S.D.N.Y. 2019), and *Make the Road N.Y. v. Cuccinelli*, No. 19-CV-7993, 2019 WL 5484638, at *12-13 (S.D.N.Y. Oct. 11, 2019), *stay denied*, Nos. 19-3591 & 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020), *stay granted*, 140 S. Ct. 599 (2020); *Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1223-24 (E.D. Wash. 2019), *stay granted*, 944 F.3d 773 (9th Cir. 2019), whereas a California district court

preliminarily enjoined implementation of the rule only with respect to residents of San Francisco, Santa Clara, California, Oregon, the District of Columbia, Maine, and Pennsylvania, *City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1130 (N.D. Cal. 2019), *stay granted*, 944 F.3d 773 (9th Cir. 2019), and an Illinois district court limited its preliminary injunction to the State of Illinois, *Cook County v. McAleenan*, No. 19-CV-6334, 2019 WL 5110267, at *14 (N.D. Ill. Oct. 14, 2019), *stay granted sub nom. Wolf v. Cook County*, 589 U.S. __ (Feb. 21, 2020).

Again, multiple federal courts across the country have had the opportunity to consider challenges to the public charge rule, despite some preliminary awards of nationwide injunctive relief.

- *Byrne-JAG*. Finally, despite district courts granting—and appellate courts affirming—nationwide injunctions against certain immigration-related conditions placed on public-safety grants under the Byrne-JAG program, there has been considerable percolation of the legal issues, including cases in the Second, Third, Seventh, and Ninth Circuits. *See State of New York v. U.S. Dep't of Justice*, 2d Cir. No. 19-267; *City of Philadelphia v. Attorney Gen. U.S.*, 3d Cir. No. 18-2648; *City of Chicago v. Sessions*, 7th Cir. No. 17-2991; *City and County of San Francisco v. Barr* and *State of California v. Barr*, 9th Cir. Nos. 18-17308 & 18-17311.

The courts appear to welcome these opportunities for percolation. For example, the U.S. District Court for the District of Columbia specifically considered the existence of litigation pending in other jurisdictions in determining that nationwide relief was nonetheless appropriate in the context of challenges to the transgender military ban. *Doe 2*, 344 F. Supp. 3d at 24 (granting nationwide injunction but explaining that it did not "deprive other courts of offering different perspectives" and that "[o]ther courts are not bound by this Court's grant of injunctive relief as is shown by the fact that there are multiple challenges to Defendants' plan independently percolating in multiple courts in multiple circuits across the country" (alterations omitted)). The same is true in recent cases concerning the rules permitting religious or moral objectors to opt out of contraceptive coverage required by the Affordable Care Act. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 834 (E.D. Pa. 2019) (observing that the risk of "foreclosing adjudication" by multiple courts was "not necessarily present here," given the parallel litigation proceeding in the Ninth Circuit (internal quotation marks omitted)), *aff'd*, 930 F.3d 543 (3d Cir. 2019), *cert. granted*, No. 19-454, 2020 WL 254168 (Jan. 17, 2020).

As the above discussion demonstrates, the issuance of nationwide injunctions has not deprived the Supreme Court of "the benefit it receives from permitting several courts of appeals to explore a difficult question" before granting certiorari. *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

At times, the Justice Department has argued that nationwide injunctions are inconsistent with *Mendoza*, in which the Supreme Court held that the doctrine of nonmutual offensive collateral estoppel does not apply against the federal government. *Id.* at 162. Not so. While a nationwide injunction might prevent the federal government from *enforcing* a particular policy, it does not preclude the federal government from *defending* that policy in new suits or making arguments that previous courts have already rejected.

Finally, and in any event, former Chief Justice Rehnquist, who authored *Mendoza*, has explained that percolation for percolation's sake is unwarranted:

> If we were talking about laboratory cultures or seedlings, the concept of issues "percolating" in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live. . . . What we need is not the "correct" answer in the philosophical or mathematical sense, but the "definitive" answer . . . .

William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U. L. Rev. 1, 11 (1986). To be sure, "[t]here are some legal issues which benefit from consideration in multiple courts—such as issues as to the reasonableness of searches or to the excessiveness of force—for which the context of different factual scenarios will better inform the legal principle." *City of Chicago*, 888 F.3d at 291. But where a challenge "presents purely a narrow issue of law; it is not fact-dependent and will not vary from one locality to another," "the duplication of litigation" through percolation "will have little, if any, beneficial effect." *Id.* at 290-91. Indeed, "reducing delay and uncertainty and creating stability are significant countervailing interests to the value of percolation, especially where individuals' lives and fundamental rights hang in the balance." Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56, 58 (2017) (hereinafter "Malveaux, *Class Actions*") (internal quotation marks omitted). In many such cases involving immigration, public benefits, and public safety, justice delayed can be justice denied.

Forum-shopping exists in all cases, not just those involving nationwide injunctions. Our judicial system is designed so that litigants have multiple choices of where to bring suit—state versus federal court, various venues under 28 U.S.C. § 1391, etc.—regardless of the nature of the relief being sought. At the same time, Congress has limited the courts where certain administrative challenges can be brought, *see, e.g.*, 42 U.S.C. § 7607(b)(1), thereby reducing or, in some cases, altogether eliminating forum-shopping in some APA "set aside" cases, which, as noted *supra* p.3, are a close cousin of nationwide injunctions.

Outside of the APA context, concerns about forum-shopping are already addressed by "checks in the system" that "lessen the potential for any misuse of nationwide injunctions." *City of Chicago*, 888 F.3d at 290. Specifically, "the appellate process can ensure that multiple judges review" a nationwide injunction, "thus acting as a check on the possibility of a judge overly-willing to issue nationwide injunctions." *Id.* At the same time, "nationwide injunctions, because of the widespread impact, are also more likely to get the attention of the Supreme Court." *Id.*

To the extent that critics are concerned that forum-shopping undermines the public perception of the federal courts as neutral arbiters of the law, the same concern exists with injunctions limited to the parties or to a particular geographic area. When a law has been found illegitimate but is still being enforced against others, it undermines public confidence in the rule of law and the notion that similarly situated individuals will be treated alike. *See supra* p. 3-4; Malveaux, *Class Actions*, 131 Harv. L. Rev. F. at 61-62.

Inconsistent injunctions do not frequently arise. Inconsistent injunctions among federal district courts rarely occur. *See* Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 462 (acknowledging this is a "less common . . . problem"); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. 67, 81 (2019) ("The overwhelming majority of the time, . . . , the courts negotiate potential problems seamlessly, but only as a matter of comity, not geographical restrictions on their power."). But to the extent inconsistencies arise, principles of comity and appellate review provide the solution. *See* Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 463 & n.274 (collecting cases and conceding that where there have been conflicting injunctions issued against the same parties, "[t]ypically one judge or the other backs down, narrowing or staying one of the issued injunctions, or else an appellate court reverses one of them").

Comity instructs "federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs." *W. Gulf Mar. Ass'n. v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Covell v. Heyman*, 111 U.S. 176, 182 (1884)). Such care normally counsels against issuing conflicting injunctions. *Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) ("Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders.").

Comity already plays a crucial role in the federal system in how state and federal courts navigate concurrent jurisdiction to adjudicate federal law. The clearest illustration of this principle is found here in the District of Columbia, where the D.C. Court of Appeals (the highest court in the District of Columbia) and the U.S. Court of Appeals for the D.C. Circuit have perfectly overlapping geographic jurisdiction. Until the Supreme Court intervenes, both are equally competent to interpret federal law for the District.

Given the paucity of conflict among federal courts pertaining to nationwide injunctions, it seems prudent to await guidance from the Supreme Court before undertaking any legislative action.

Class actions are not an adequate substitute for nationwide injunctions. Critics of nationwide injunctions frequently argue that class actions are a more appropriate vehicle for seeking relief for a broad group of individuals. *See, e.g.*, Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, The Atlantic (Oct. 31, 2018), https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471/. But class actions are often a poor substitute for broad injunctive relief, particularly for States and localities seeking to vindicate their governmental and proprietary interests. As Congress has recognized, governmental plaintiffs often seek to vindicate different interests from private litigants, and should not be compelled to participate in class actions to vindicate those interests. *See, e.g.*, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (recognizing States' special responsibility for the "health, safety, and welfare of [their] citizens"). Moreover, as some proponents of nationwide injunctions have argued, class actions may be impracticable in cases where large groups of individuals with factually different claims will suffer irreparable harm from the same federal policy. *See, e.g.*, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1094-98 (2018).

Conclusion

Thank you for the opportunity to share the views of the Office of the Attorney General for the District of Columbia with you today.