Loren AliKhan – Rule by District Judge: The Challenges of Universal Injunctions

QUESTION FROM SENATOR KLOBUCHAR

1. Federal district courts in California, New York, and the District of Columbia found that the Administration violated the Administrative Procedure Act when it attempted to terminate the Deferred Action for Childhood Arrivals ("DACA") program and issued nationwide injunctions to prevent the termination from taking effect during the appeals process. What would have happened to DACA recipients if these courts were prevented from issuing these injunctions?

If the courts had been unable to grant nationwide preliminary injunctive relief, the fate of hundreds of thousands of DACA recipients would have hung in the balance. As of September 4, 2017, the day before the rescission of DACA, there were 689,800 active DACA recipients.[1] Only a small fraction of those recipients were parties to the cases challenging the rescission. In the absence of nationwide injunctive relief, the legal status of all recipients who were not parties to those cases would have ultimately expired with no possibility of renewal. Though some active DACA recipients might have been eligible to apply for status on other grounds, the vast majority would have been stripped permanently of legal status and work authorization. The nationwide harms of the rescission of DACA cannot be understated.

QUESTIONS FROM SENATOR COONS

1. In practice, how often do federal district courts issue conflicting injunctions?

Federal district courts rarely issue conflicting injunctions. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev 417, 462 (2017) (hereinafter "Bray, *Multiple Chancellors*") (acknowledging that inconsistent injunctions are a "less common . . . problem"); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. 67, 81 (2019) (hereinafter "Trammell, *Demystifying Nationwide Injunctions*") ("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."). Principles of comity reduce the risk that one district court will order universal relief that directly contravenes another district court's order. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979) (instructing courts considering certification of a nationwide class to "take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts"). This is because comity counsels "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)). In practice, such care typically advises against issuing inconsistent injunctions. *See Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) ("Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders."). On the rare occasions where courts have issued inconsistent injunctions, "[t]ypically one judge or the other backs down, narrowing or staying one of the issued injunctions,

[1] USCIS, Active DACA Recipients as of September 4, 2017 by Month Validity Expiration and Status of Associated Renewal Request as of November 2, 2017, https://tinyurl.com/welh2eq.

or else an appellate court reverses one of them." Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 463. As a result, the risk that parties will be bound by contradictory court orders is quite low.

2. What is the practical effect of nationwide injunctions on parties and non-parties?

In assessing the practical effects of nationwide injunctions, it is important to distinguish between preliminary and permanent injunctions.

Preliminary Injunctions. The majority of nationwide injunctions issued in recent cases have been preliminary in nature. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). This "interim equitable relief" aims "not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citing *Univ. of Tex.*, 451 U.S. at 395). In this way, a preliminary injunction simply maintains the status quo and seeks to prevent harm to either party until the court can issue a full legal determination. Thus, while a preliminary injunction may incidentally benefit third parties who are similarly situated to the plaintiffs, its primary function is to maintain the parties' positions while their case is pending.

Recent cases demonstrate that, by granting nationwide preliminary relief, courts can prevent severe disruptions to vulnerable populations while giving the parties time to brief and argue a case on the merits. For example, the nationwide preliminary injunctions issued in the litigation over the DACA program did not conclusively determine the legality of the rescission of DACA, but instead preserved the status quo by requiring the federal government to continue considering DACA applications and renewal requests pending a decision on the merits. *See, e.g.*, *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 436 (E.D.N.Y. 2018) (reasoning that a preliminary injunction against implementation of the rescission would "preserve the status quo, enabling a full resolution of this matter on the merits, rather than allowing severe social dislocations to unfold based on an agency decision that . . . strongly appears to have been arbitrary and capricious"), *cert. before judgment granted sub nom. McAleenan v. Vidal*, 139 S. Ct. 2773 (2019).

Similarly, courts considering challenges to the revised definition of "public charge" for purposes of inadmissibility under the Immigration and Nationality Act granted preliminary relief to maintain the existing state of affairs. As one court observed, "preserving the status quo would not create a significant break in the enforcement of the immigration laws," but instead "would allow DHS to continue administering the public charge admissibility standards in the way that it has done for arguably more than a century and at least since 1999 when the INS issued its Field Guidance." *Casa de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 785 (D. Md. 2019), *stay pending appeal granted*, No. 19-2222, Dkt. 21 (4th Cir. Dec. 9, 2019). Under the circumstances, the court determined that it was "in the public interest to preserve the status quo and grant a preliminary injunction." *Id.*; *see Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1222 (E.D. Wash. 2019) (granting a nationwide preliminary injunction where the federal government "made no showing of hardship, injury to themselves, or damage to the public interest from continuing to enforce the status quo with respect to the public charge ground of inadmissibility until these issues can be resolved on the merits"), *stay granted*, 944 F.3d 773 (9th Cir. 2019).

Preliminarily injunctive relief also prevents state and local governments from bearing the administrative, financial, and resource burdens of compliance with a new directive when its lawfulness is in question. For example, when the Department of Justice imposed new,

immigration-related conditions on public-safety grants awarded through the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne-JAG"), courts issued preliminary injunctions to prevent affected jurisdictions from losing a critical source of funding while litigation was pending. *See, e.g.*, *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 655 (E.D. Pa. 2017) (finding that, "given the long history of Philadelphia's reliance on the annual receipt of Byrne JAG grants, and the absence of any evidence of abuse or misapplication, the preservation of the status quo [was] one substantial reason to grant the City's motion for preliminary injunction").

Similarly, when Pennsylvania and New Jersey challenged new rules permitting religious or moral objectors to opt out of the Affordable Care Act's contraceptive mandate, the district court determined that a nationwide preliminary injunction was appropriate in part to protect states from "'significant, direct and proprietary harm' . . . in the form of increased use of state-funded contraceptive services, as well as increased costs associated with unintended pregnancies." *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 835 (E.D. Pa. 2019), *aff'd*, 930 F.3d 543 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 918 (2020). The court observed that, while the rules "permit any entity to opt out of coverage after 30 to 60 days' notice to plan members," the litigation would "not conclude in that short span" and thus "[a] preliminary injunction [was] unquestionably in the public interest because it [would] maintain[] the status quo pending the outcome of this litigation." *Id.* at 829; *cf. District of Columbia v. U.S. Dep't of Agriculture*, No. 20-CV-119, 2020 WL 1236657, at *22-26 (D.D.C. Mar. 13, 2020) (issuing nationwide injunction against federal rule concerning the Supplemental Nutrition Assistance Program ("SNAP") and discussing the harm to states).

Permanent Injunctions. After a plaintiff has prevailed on the merits, it is in the court's equitable discretion to grant a permanent injunction. *eBay Inc. v. MercExch., L.L.C.*, 547 U.S. 388, 391 (2006). At this stage, nationwide injunctions conclusively determine the rights of the parties going forward. Courts have issued permanent nationwide injunctive relief far less frequently than preliminary relief.

Practical effects of nationwide injunctive relief. Many of the practical consequences of nationwide injunctions are true of both preliminary and permanent injunctions. One practical effect is that nationwide injunctive relief enables courts to uphold the rule of law by ensuring that unlawful conduct cannot continue in any jurisdiction. For example, following its entry of a preliminary injunction against the imposition of new conditions on Byrne-JAG funding, an Illinois district court determined that a permanent injunction was appropriate. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 882 (N.D. Ill. 2018) (granting permanent injunction but staying nationwide scope pending Seventh Circuit's review of preliminary injunction). In granting the permanent injunction, the court recognized that the "role of the judiciary to enjoin conduct by the executive that crosses its constitutionally-imposed limits is as essential to our form of government as it is well-established." *Id.* at 879. And, as the court explained in its preliminary injunction ruling, "[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 relief prevents piecemeal compliance with the rule of law.

Nationwide injunctions also ensure that similarly situated parties receive equal treatment under the law. For example, 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 issued, 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. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam). Instead, 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.* In this way, the effects of an injunction may properly benefit third parties.

In addition, courts' ability to order nationwide relief serves judicial economy by preventing a barrage of identical requests for relief. *See, e.g.*, *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 24 (D.D.C. 2018) (reasoning 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" (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998))), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019) (per curiam). For example, in considering the aforementioned challenge to immigration-related conditions imposed on Byrne-JAG funding, 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 a preliminary injunction against the immigration 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.*

3. How can conflicting injunctions be resolved?

Principles of comity and appellate review are sufficient to resolve conflicting injunctions. 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*, 751 F.2d at 728 (citing *Kerotest Mfg. Co.*, 342 U.S. at 180; *Covell*, 111 U.S. at 182). Such care normally counsels against issuing conflicting injunctions. *Feller*, 802 F.2d at 727-28 ("Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders.").

The principle of comity already plays an especially important role in our federal system where federal and state courts share overlapping geographic jurisdiction. As noted in the written testimony, a perfect example of this is present here in the District of Columbia, where both the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit are equally competent to interpret federal law and share perfectly overlapping geographic jurisdiction. These courts already must navigate their concurrent jurisdiction and the risk of issuing inconsistent judgments or obligations.

The Supreme Court has also instructed courts to take comity into consideration when issuing relief extending beyond that court's geographic jurisdiction: "A federal court when asked to certify a

nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Califano*, 442 U.S. at 702-03.

When conflicting injunctions do occur, principles of comity also instruct courts to first attempt resolution of the issues among themselves. As Professor Bray notes from past cases where conflicting injunctions have been issued, "[t]ypically one judge or the other backs down, narrowing or staying one of the issued injunctions." Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 463 & n.274. When lower courts are not able to resolve the conflict, appellate review serves as an effective fail-safe if a party faces conflicting obligations. *Id.*; *see Feller*, 802 F.2d at 727-28 (vacating a preliminary injunction that directly conflicted with another injunction).

4. Please respond to the assertion that nationwide injunctions can discourage the percolation of difficult legal questions across various federal district and appellate courts.

Recent litigation over high-profile issues in courts across the country belies the notion that the availability of nationwide injunctive relief prevents issues from percolating through the lower courts. Consider, for example, the following issues:

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 rescission of the program and while 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. Multiple challenges to the various iterations of President Trump's travel ban percolated through federal courts across the country, despite the grant of nationwide preliminary relief early in the litigation.

Initially, 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).

Next, following President Trump's March 16, 2017 executive order, a Hawaii district court issued a nationwide temporary restraining order, later converted into a preliminary injunction, which barred enforcement of the travel ban and the 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).

Finally, after 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 person 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).

Public Charge. Following the promulgation of a 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.*, 414 F. Supp. 3d at 786-87; *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*, 417 F. Supp. 3d 1008, 1031 (N.D. Ill. 2019), *stay granted sub nom. Wolf v. Cook County*, 140 S. Ct. 681 (2020).

Byrne-JAG. Although several district courts issued nationwide injunctions, courts in the Second, Third, Seventh, and Ninth Circuits have had the opportunity to consider challenges to certain immigration-related conditions placed on public-safety grants under the Byrne-JAG program. *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.

Moreover, courts deciding whether to order nationwide relief appreciate these opportunities for percolation. For example, the U.S. District Court for the District of Columbia specifically noted the existence of challenges to the transgender military ban pending in other jurisdictions when it determined that a nationwide injunction against the ban was appropriate. *Doe 2*, 344 F. Supp. 3d at 24 (reasoning 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*, 351 F. Supp. 3d at 834 (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)).

Together, these examples illustrate that the availability of nationwide injunctive relief has not deprived the Supreme Court of the benefit of having multiple courts in different parts of the country consider an issue before it reaches the Court. In addition, one should keep in mind Chief Justice Rehnquist's observation 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). Stated differently, 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." *City of Chicago*, 888 F.3d at 290-91. Indeed, the uncertainty that results as issues percolate through the courts may often cause grave harm to the individuals whose rights are at stake.

5. In your view, what types of situations warrant issuance of a nationwide injunction?

Nationwide injunctions are appropriate when they are necessary to provide complete relief to the individuals and entities who have been harmed. For example, when the plaintiffs do not all live in the jurisdiction where a case is brought, an injunction must extend beyond the court's geographical limits to provide relief to all plaintiffs. *See, e.g.*, *Saget v. Trump*, 375 F. Supp. 3d 280, 379 (E.D.N.Y. 2019) (reasoning, in granting a nationwide injunction against rescission of Temporary Protected Status for Haitians, 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").

Similarly, when the right at stake is indivisible, granting relief to one plaintiff will necessarily benefit similarly situated third parties. For example, cases involving desegregation and reapportionment redress indivisible rights by implementing relief that extends beyond the named plaintiffs. *See* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 646 n.184 (2017) (hereinafter "Morley, *Nationwide Injunctions*") (observing that "[i]n 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").

In addition, nationwide relief is appropriate when the plaintiffs can be harmed in situations outside the confines of the court's geographic jurisdiction. For example, when Washington State and Minnesota challenged the President's initial travel ban, they asserted that nationwide relief was necessary to ensure that their affected residents and those traveling to meet them would not be stopped at ports of entry outside the states' boundaries. The U.S. Court of Appeals for the Ninth Circuit agreed and upheld the injunction, 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).

In the same way, nationwide injunctions are critical when the harm permeates geographic borders, such as in the context of regulations governing air, water, endangered species, greenhouse gases, fuel emissions, clean power, food and drugs, and pesticides. *See, e.g., S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 969 (D.S.C. 2018) (issuing 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 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").

Finally, courts have repeatedly recognized that where a systemwide policy uniformly harms individuals to whom it applies, a systemwide remedy is necessary to provide complete relief. *Batalla Vidal*, 279 F. Supp. 3d at 438 ("Because the decision to rescind the DACA program had a systemwide impact, the court will preliminarily impose a systemwide remedy." (internal quotation marks omitted)); *Saget*, 375 F. Supp. 3d at 379 (observing that nationwide injunctive relief is appropriate 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").

QUESTIONS FROM SENATOR BOOKER

1. **In your testimony, you stated: "Some rights are indivisible, in which case granting relief to one plaintiff necessarily affects third parties. Classic examples are desegregation and reapportionment cases." The discretion of federal courts to provide universal injunctive relief allows individuals relief in cases where class actions are not permitted or people lack access to justice.**

    a. **If universal injunctions were simply ended, how would courts be able to provide complete and appropriate relief in the kinds of cases you mentioned involving indivisible rights?**

Ending universal injunctions would impede the ability of federal courts to afford complete and appropriate relief to plaintiffs when indivisible rights are at stake. *See* Morley, *Nationwide Injunctions*, 97 B.U. L. Rev. at 646 n.184 (observing that "[i]n 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"). This is true in cases involving, for example, constitutional rights, sexual harassment, prison conditions, abortion rights, and economic regulation. *See* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buff. L. Rev. 301, 313-14 (2004) (highlighting cases where courts have granted broad prophylactic relief that addresses defendants' conduct "attendant to the direct harm"). In such cases, remedying the "precise source of harm" necessarily results in benefitting similarly situated

parties. Trammell, *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. at 91. If courts can only order injunctive relief that runs against the parties to a particular case, a plaintiff seeking to vindicate an indivisible right may be unable to obtain relief that fully remedies the alleged harm.

For example, in the school desegregation context, allowing one African-American plaintiff to attend a school previously foreclosed to members of her race does not achieve the goal of desegregation. As the Supreme Court explained, in carrying out the integration mandate:

> School boards . . . then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The constitutional rights of Negro school children . . . permit no less than this.

Green v. Cty. Sch. Bd., 391 U.S. 430, 437-38 (1968) (citations omitted).

Similarly, in the context of prison conditions, the Supreme Court upheld an injunction directing California to reduce its prison population. *Brown v. Plata*, 563 U.S. 493, 545 (2011). The Court reasoned that the purpose of the injunction was not only to redress the prisoner-plaintiffs' harm, but also to redress the conditions creating the "extensive and ongoing constitutional violation." *Id.*

These are just a few examples where injunctive relief necessarily had to extend beyond the particular plaintiff and affect similarly situated individuals to afford complete relief to the plaintiff. As the Supreme Court has recognized, "the scope of injunctive relief is dictated by the extent of the violation established." *Califano*, 442 U.S. at 702. When a right is indivisible, the scope of injunctive relief to remedy the violation will necessarily affect similarly situated individuals.

b. What are the key legal authorities in determining whether Congress or the Supreme Court is the proper body to set any new rules regarding the use of universal injunctions?

Article III of the U.S. Constitution authorizes Congress to establish the lower courts, U.S. Const. art. III, § 1, and further provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity," *id.* § 2, cl. 1. The Constitution does not impose any limits on the "judicial power" to remedy harms based on whether the court is a district or appellate court, the geographic location of the court, the nature of the harm, or the status of the plaintiff. Thus, universal injunctions are consistent with the broad grant of judicial power in Article III.

Congress has limited the jurisdiction and remedial powers of the federal courts in narrow measures on limited occasions. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2244(b)(3)) (requiring authorization by a federal court of appeals to file a second or successive habeas corpus application and providing that the grant or denial of such authorization shall not be appealable); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1252(a)(2)(B)(ii)) (restricting federal courts' authority to review "decision[s] or action[s] of the Attorney General or the Secretary of Homeland Security" which are "specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security"); Emergency Price Control Act of 1942, ch. 26, § 204, 56 Stat. 23, 31-33 (lapsed 1947) (permitting only a special Emergency Court of Appeals and the Supreme Court, but not the lower federal courts, to review certain administrative orders); Tax Injunction Act, ch. 726, § I, 50 Stat.

738, 738 (1937) (codified as amended at 28 U.S.C. § 1341 (2006)) (restricting federal courts' authority to issue injunctions in disputes over state taxation); Norris-LaGuardia Act, ch. 90, § I, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 101 (2006)) (restricting federal courts' authority to issue restraining orders or injunctions in labor disputes).

Far more frequently, however, it is the Supreme Court that has determined that the federal courts lack the authority to hear certain types of cases—*see, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019) (holding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts"); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (holding that there is no cause of action under the Alien Tort Statute for violations of the law of nations occurring within the territory of a foreign sovereign); *Stern v. Marshall*, 564 U.S. 462, 487-95 (2011) (holding that bankruptcy courts lack jurisdiction to hear state law claims not resolved by ruling on bankruptcy claims); *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890) (holding that the Eleventh Amendment bars suit in federal court against a state without the state's consent)—or to issue certain forms of relief—*see, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 749-50 (2020) (declining to extend *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and create a damages remedy for a cross-border shooting); *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220-21 (2002) (holding that the Employee Retirement Income Security Act ("ERISA") does not authorize employee benefit plans to sue for specific performance of reimbursement provision of ERISA plan); *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 264-65 (1999) (holding that sovereign immunity bars creditors from enforcing equitable liens on federally owned property); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding that the Eleventh Amendment bars federal courts from enjoining state officials to conform their conduct to state law); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981) (holding that federal courts lack authority to create a right to contribution among antitrust defendants).

The Supreme Court takes seriously its "province and duty" to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Given the Court's long and robust history of policing the jurisdiction and remedial powers of the federal courts, it seems prudent to give the Court the opportunity in the first instance to address the availability of universal relief.

c. Many of the recent cases that have involved the issuance of a universal injunction have been immigration cases, as you noted in your testimony. If Congress or the Supreme Court were to restrict the use of universal injunctions, what kinds of cases—and accordingly, what kinds of third parties—would be most likely to be affected?

Limiting the use of universal injunctions would gravely affect some of our country's most vulnerable residents. These injunctions have been necessary to provide complete relief in immigration cases, given that the individual plaintiffs harmed by, for example, the termination of Temporary Protected Status for individuals from Haiti residing in the United States, *Saget*, 375 F. Supp. 3d at 379, or the rescission of the DACA program, *Regents of Univ. of Cal.*, 908 F.3d at 512, do not all reside in a single judicial district. Immigrants who are valued members of communities across the country will be at a disadvantage if courts cannot order universal relief to remedy these harms. Restrictions on universal relief will also affect indigent individuals who lack the resources to pursue individual claims to vindicate their rights in a timely manner. *See District of Columbia*, 2020 WL 1236657, at *30 (explaining that, for approximately 700,000 individuals

poised to lose SNAP benefits, "[g]oing without food is an irreparable harm").

Moreover, based on the District's recent experience in several cases involving universal injunctions, the inability to obtain universal relief will uniquely and disproportionately affect states as litigants. These injunctions are a critical tool for states challenging actions, decisions, and policies that cross state lines. *See, e.g.*, *Washington*, 847 F.3d at 1167 (reasoning, in a challenge brought by Washington State and Minnesota, that universal relief against implementation of the President's initial travel ban was necessary to ensure that the states' residents and individuals traveling to meet their residents would not be stopped at ports of entry outside the states' boundaries). Again, states are often important representatives on behalf of their vulnerable residents, who may not otherwise have the resources to bring suit. Finally, if universal relief is no longer available, the courts' inability to completely redress cross-border environmental harms implicating, for example, natural resources, endangered species, greenhouse gases, and fuel emissions, may adversely affect individuals across the country.

2. In your testimony, you also stated that universal injunctions are consistent with "well-settled principles of equitable relief" and the rule of law.

a. If Congress were to restrict the use of universal injunctions, how would such an action affect existing principles of equitable relief and the courts' responsibility to uphold the rule of law?

Restricting the use of universal injunctions would result in a deviation from existing equitable principles, making it more difficult for courts to grant plaintiffs complete relief and undermining the rule of law.

As noted, restricting universal injunctions would not only upset the federal courts' ability to afford a party complete relief, *see supra* answer to 1a., but it would also constitute a deviation from the basic principle that a court of equity acts *in personam*, exercising jurisdiction over the party before it. *See Hart v. Sansom*, 110 U.S. 151, 155 (1884); John H. Langbein, et al., History of the Common Law: The Development of Anglo-American Legal Institutions 286 (2009). The proper scope of equitable relief is determined by considering the harm to the plaintiff. *See Califano*, 442 U.S. at 702 ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."). And the Supreme Court has made clear that existing equitable principles permit a "[c]ourt in exercising its equity powers [to] 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).

Deviating from these traditional equitable principles undermines the rule of law. Indeed, in *Marbury*, Chief Justice Marshall warned that the United States would fail to operate as a "government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) at 163. "[T]he authority to provide a meaningful remedy is important, both functionally and symbolically, for the federal courts' ability to pronounce robust constitutional or legal norms, to ensure adequate checks on government at both the state and federal level, and thus to secure the rule of law in a constitutional democracy." Mila Sohoni, *The Lost History of The "Universal" Injunction*, 133 Harv. L. Rev. 920, 1007 (2020).

Moreover, restricting universal injunctions undermines a fundamental principle of our legal system—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*, 375 F. Supp. 3d at 379 (enjoining rescission of Temporary Protected Status for Haitians). One example of this stems from a recent challenge to the U.S. Attorney General's imposition of immigration-related conditions on public-safety grants under the Byrne-JAG program. 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*, 2017 WL 4572208, at *4. When a court finds that a law is illegal but the law continues to be enforced against similarly situated parties, it undermines public confidence in the rule of law and the notion that similarly situated individuals will be treated alike. *See* Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56, 61-62 (2017).

b. Would Congress's weighing in on the issue encroach on the role and authority of the Supreme Court? Please explain your answer.

As matter of constitutional law, Congress has the ability to enact legislation concerning the availability of universal injunctions, and doing so would not formally encroach on the role or authority of the Supreme Court. Article III confers on Congress the authority to "ordain and establish" the lower courts. U.S. Const. art. III, § 1. For this reason, the Supreme Court has acknowledged that Congress can limit the equitable powers of the federal courts. *See, e.g.*, *Lockerty v. Phillips*, 319 U.S. 182, 188 (1943) (recognizing that "Congress ha[d the] power to provide that the equity jurisdiction to restrain enforcement of the [Emergency Price Control] Act, or of regulations promulgated under it, be restricted to the Emergency Court [of Appeals], and, upon review of its decisions, to this Court").

However, as detailed above, *see supra* answer to 1b., the Supreme Court has carefully considered—and, when appropriate, limited—the jurisdiction and the equitable powers of the federal courts. The Court has special expertise in this field, as the "[i]nterpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001); *see Marbury*, 5 U.S. (1 Cranch) at 177 ("Those who apply the rule to particular cases[] must of necessity expound and interpret that rule."). The Court has made clear that the scope and availability of universal injunctions are questions with which it is actively grappling. *See, e.g.*, *Wolf*, 140 S. Ct. at 681-84 (2020) (Sotomayor, J., dissenting from grant of stay); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring in grant of stay); *Trump*, 138 S. Ct. at 2425-29 (Thomas, J., concurring). Consequently, it would be prudent for Congress to respect "the province and duty of the judicial department to say what the law is" by permitting the Supreme Court to opine on universal injunctions in the context of a "particular case[]." *Marbury*, 5 U.S (1 Cranch) at 177.