

Testimony of Jesse Panuccio

**Every Judge a King, Every Court Supreme:
The Problem of Non-party Injunctions**

**Hearing Before the
Committee on the Judiciary
United States Senate**

**“Rule by District Judge:
The Challenges of Universal Injunctions”**

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Chairman Graham, Ranking Member Feinstein, and members of the Committee: thank you for the opportunity to be here today. At the outset, I should note that the views expressed in my testimony are my own and do not necessarily reflect those of my law firm, any of its clients, any of my clients, or of the academic institution with which I am affiliated.¹

I appreciate the Committee’s consideration of a growing problem in our federal judiciary—namely, the use of equitable power by federal district courts to grant relief to parties not before them. These injunctions have had various monikers of late—nationwide, universal, or even cosmic. I think they are most aptly labeled non-party injunctions because that term, while not as catchy, accurately describes what the courts are doing, regardless of geographic scope. As Justice Gorsuch recently put it, these injunctions have “a court ... ordering the government to take (or not take) some action with respect to those who are strangers to the suit.”²

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

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So long as Congress and the Supreme Court permit lower federal courts to issue non-party injunctions against the government, it is difficult to criticize any lawyer for seeking one on behalf of a client whose interests would be served by obtaining one. I will certainly do so if it is in a client’s interest. But, as I explain in this testimony, for the good of our legal system, it is my personal view that either Congress or the Supreme Court must soon address the issuance of non-party injunctions.

² *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay).

of their government. It is a question that asks whether our federal courts exist to decide cases or advance causes. It is a question about whether judicial independence can survive when courts act like legislators or executive officials. As Justice Gorsuch has urged, “it has become increasingly apparent” that the time has come to address the “important objections to this increasingly widespread practice.”³ Put another way, the time has come for either the Supreme Court or Congress to reign in a practice that renders every judge a king, and every court supreme.

I have direct experience with the problem of non-party injunctions 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 government agencies and actors, granting relief to millions of parties not before those courts. And this was just a two-year period. According to the latest numbers reported by the Department of Justice, twelve nationwide injunctions were issued against the Bush administration, nineteen against the Obama administration, and fifty-five (and counting) against the Trump administration.⁴

Thus, the issue here is not about a preference for any particular substantive policy. Perhaps you favor the Obama administration’s immigration, healthcare, or environmental policies; perhaps you favor the Trump administration’s policies in

³ *Id.*

⁴ Deputy Attorney General Jeffrey A. Rosen, Address at the Administrative Conference of the United States Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020).

these areas. The common ground is that lower courts enjoined them all nationwide, providing relief to parties who never requested it and were not entitled to it.⁵ As one law professor has put it, the “propriety of nationwide injunctions is truly a nonpartisan issue; laws, regulations, and policies favored by either major party may be completely invalidated, at least for a time, by a single district judge.”⁶ Accordingly, the Department of Justice, across administrations and Attorneys General, has consistently argued against granting relief beyond the parties to a case.⁷

Because the problem of overbroad injunctive relief has become so pervasive, 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.”⁸ This memorandum—and a plethora of recent scholarship, speeches, articles, DOJ briefs, and a few judicial writings—set out the

⁵ 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 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 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 enforcement of Trump administration environmental rule).

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

⁷ 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 Trump administrations).

⁸ See Sessions Memo, *supra* note 7, at 1.

reasons why non-party injunctions are so problematic. I will highlight some of them here.

Before I do that, let me offer one concrete example of a nationwide, non-party injunction that demonstrates just how extreme the practice has become. 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.”⁹ But rather than stopping at 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.”¹⁰ 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.

⁹ *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951(2017).

¹⁰ *Id.*

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

The first problem with non-party injunctions is that, as Justice Thomas has explained, they “are legally and historically dubious.”¹¹ The Constitution grants to federal courts the power to hear “Cases” and “Controversies,”¹² which the Supreme Court has long interpreted as the power “to render a judgment or decree upon the rights of litigant parties.”¹³ 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 requirement of Article III.”¹⁴ 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.”¹⁵ 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.”¹⁶ Indeed, we have even seen a

¹¹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring).

¹² U.S. CONST. art. III, § 2.

¹³ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838).

¹⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁵ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). See also *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (“standing is not dispensed in gross,” and a “plaintiff must demonstrate standing ... for each form of relief that is sought”); *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (the remedy “must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established”).

¹⁶ Sessions Memo, *supra* note 7, at 3.

district court grant an injunction to parties who have explicitly informed the court that they do not want it and instead support the policy being enjoined.¹⁷

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, and these grants in turn “must comply with longstanding principles of equity that predate this country’s founding.”¹⁸ 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.¹⁹

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

¹⁷ 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).

¹⁸ *Hawaii*, 138 S. Ct. at 2426 (Thomas, J., concurring).

¹⁹ See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

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 once 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.”²⁰

There are several judicial rules 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.”²¹ Congress has established a multi-tiered court system with specific jurisdictional reach.²² In this hierarchical court system, one district court does not bind another, and one circuit court does not bind another.²³ It is only the Supreme Court’s judgments that are binding on all federal courts. Yet nationwide, non-party injunctions produce this exact outcome by stripping from other courts the efficacy of judgments finding in the government’s favor—that is, finding that a plaintiff has no entitlement to injunctive relief.²⁴ The nationwide, non-party injunction thus simultaneously makes every court supreme and every court a potential nullity.

²⁰ *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

²¹ U.S. CONST. art. III, § 1 (emphasis added).

²² See 28 U.S.C. §§ 41, 81-132, 1251-1413.

²³ 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).

²⁴ The litigation over the Trump Administration’s rescission of the Deferred Action for Childhood Arrivals (DACA) policy is an example. A federal district court in Maryland held that the rescission 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 injunctions, granting these plaintiffs the very relief they could not achieve in the actual lawsuit to which they were a party. See *id.* at 767.

A second legal rule that expresses a preference for percolation is that non-mutual 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."²⁵ Yet courts issuing nationwide, non-party injunctions are ignoring this rule altogether and producing the exact situation the Supreme Court has cautioned against.

A third legal norm expressing a preference for percolation is found in Supreme Court Rule 10, which states, as the very first reason the Court might agree to hear a case: "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." 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. Just last Friday, Justice Sotomayor noted that, in the wake of these many non-party

²⁵ *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

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.”²⁶

Casting aside these longstanding rules and norms that promote percolation, the nationwide, non-party injunction is fundamentally altering our legal 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 six-hundred or so active judges and four-hundred or so 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.

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 have argued that nationwide injunctions are necessary to achieve national uniformity and complete relief. But this is the very purpose of the class action.²⁷ And the class action system, governed by statutes and the Federal Rules of

²⁶ *Wolf v. Cook County*, No. 19A905, slip op. at 1 (U.S. Feb. 21, 2020) (Sotomayor, J., dissenting from the grant of stay).

²⁷ 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,

Civil Procedure, has safeguards that seek to ensure the appropriateness of class-wide relief, the adequacy of representation, the rights of class members to opt out, 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 23.²⁸ And they permit the government no finality and bind the plaintiff class not at all: the government must run the table while plaintiffs can simply keep suing in court after court after court until they find a single judge who is willing to grant non-party relief.

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 non-parties, 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.

so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”).

²⁸ Likewise, 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.”

C. 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 norms and rules, 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,²⁹ it is—in the words of Justice Gorsuch—“hard to see how the court [granting a non-party injunction] could still be acting in the judicial role of resolving cases and controversies.”³⁰ 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 Register to assess the legality of administrative rules and policies before they 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.”³¹ 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.”³² This is precisely what a Council of Revision would have done.

²⁹ See Sessions Memo, *supra* note 7, at 6.

³⁰ *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay).

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

³² *City of Chicago*, 264 F. Supp. 3d at 951.

But it is not what the “inferior Courts” that our Constitution actually established are supposed to do.

The nationwide, non-party injunction is an act of national policymaking, and that is a role reserved, in our 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 the nationwide, non-party injunction is a necessary check on the ever-growing power of the executive branch’s administrative agencies.³³ 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.

And, of course, the more life-tenured judges act like policymakers, the less the confidence the public will have in federal courts, because the American people have a stubborn tendency to want to have a say in the rules that govern their lives. Of

³³ See Amanda Frost, *Academic highlight: The debate over nationwide injunctions*, SCOTUSBLOG (Feb. 1, 2018, 10:21 AM), available at <https://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions/> (citing Suzette M. Malveaux, 131 HARV. L. REV. F. 56 (2017)).

late, we have heard much about how criticism of judges and courts can undermine respect for the judiciary. That is a very important point, but it is also incumbent upon a judiciary that wants to avoid the rough-and-tumble of our nation's political life not to inject itself into our nation's political life by reaching beyond the cases and parties that come before it.

Chairman Graham, Ranking Member Feinstein, and Members of the Committee, thank you, again, for the opportunity to be here today.