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Subcommittee on Courts, Intellectual Property and the Internet**

The Role and Impact of Nationwide Injunctions by District Courts
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Introduction

Nationwide injunctions are becoming an increasingly common remedy in public law litigation in federal court, particularly constitutional challenges to federal policies and other actions. Through a nationwide injunction, a single district judge with limited geographic jurisdiction is able to impose his or her interpretation of the Constitution on rightholders throughout the nation, including in states where that judge's opinion lacks precedential value and over whose citizens that judge lacks personal jurisdiction. Over the past year, courts have issued nationwide injunctions against President Donald J. Trump's travel bans,¹ restrictions on transsexuals in the military,² and prohibition on the provision of federal funds to sanctuary cities.³

¹ See *Int'l Refugee Assistance Project v. Trump*, Nos. TDC-17-0361, TDC-17-2921, TDC-17-2969, 2017 U.S. Dist. LEXIS 1879, at *136-43 (D. Md. Oct. 17, 2017) (granting nationwide preliminary injunction against third executive order), *reh'g en banc granted* No. 17-2231 (L), 2017 U.S. App. LEXIS 22168 (4th Cir. Nov. 6, 2017) (en banc); *Hawaii v. Trump*, No. 17-50 DKW-KSC, 2017 U.S. Dist. LEXIS 171242, at *49 (D. Haw. Oct. 17, 2017) (granting nationwide temporary restraining order against third executive order), *stay granted in part and den'd in part*, No. 17-17168, 2017 U.S. App. LEXIS 22725, at *4-5 (9th Cir. Nov. 13, 2017) (order); *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017) (granting nationwide temporary restraining order against second executive order), *converted to preliminary injunction*, *Hawaii v. Trump*, No. 17-50 (DKW-KSC), 2017 U.S. Dist. LEXIS 47042, at *23 (D. Haw. Mar. 29, 2017) (granting nationwide preliminary injunction against second executive order), *affirmed in part and vacated in part*, 859 F. 3d 741, 787-88 (9th Cir. 2017), *vacated and remanded*, No. 16-1540, 2017 U.S. LEXIS 6367 (Oct. 24, 2017); *Int'l Refugee Assistance Proj. v. Trump*, 241 F. Supp. 3d 539, 565-66 (D. Md. 2017) (granting nationwide preliminary injunction against second executive order), *aff'd in part and vacated in part*, 857 F.3d 554, 605 (4th Cir. en banc), *stay granted* 137 S. Ct. 2080, 2089 (2017), *vacated and remanded*, No. 16-1436, 2017 U.S. LEXIS 6265 (Oct. 10, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at *8 (W.D. Wash. Feb. 3, 2017) (granting nationwide temporary restraining order against first executive order), *stay denied*, 847 F.3d 1151, 1166-67 (9th Cir. 2017), *reh'g en banc denied*, 858 F.3d 1168 (9th Cir. 2017) (amended order).

² Preliminary Injunction, *Stone v. Trump*, No. 1:17-CV-2459-MJG, Dkt. No. 84, at 1-2 (D. Md. Nov. 21, 2017); *Doe v. Trump*, No. 1:17-CV-1597-CKK, 2017 U.S. Dist. LEXIS 178892, at *116-17 (D.D.C. Oct. 30, 2017).

³ *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (granting nationwide preliminary injunction against sanctuary city order), *reconsideration denied*, No. 17-CV-574-WHO, 2017 U.S. Dist. LEXIS 113407 (N.D. Cal. July 20, 2017), *converted to permanent injunction*, 2017 U.S. Dist. LEXIS 191840, at *59-60 (N.D. Cal. Nov. 20, 2017) (issuing nationwide permanent injunction against sanctuary city order); *City of Chicago v. Sessions*, No. 17-C-5720, 2017 U.S. Dist. LEXIS 149847, at *44 (N.D. Ill. Sept. 15, 2017) (issuing nationwide

Toward the end of the previous Administration, lower courts likewise entered nationwide injunctions against President Barack Obama’s Deferred Action for Parents of Aliens (“DAPA”) program and expansion of his Deferred Action for Children of Aliens (“DACA”) program,⁴ as well as U.S. Department of Education guidelines concerning transgender students’ bathroom usage in schools⁵ and parts of the Affordable Care Act.⁶

As these precedents demonstrate, determining the proper scope of injunctive relief is not a partisan issue—statutes and policy initiatives from both sides of the political spectrum are subject to judicial review and invalidation. Nationwide injunctions raise a wide range of jurisdictional, constitutional, and policy considerations, and are in serious tension with the hierarchical, decentralized nature of the federal judiciary. Sometimes, courts enter such injunctions without carefully considering all of the relevant doctrines and limitations on their authority. In other cases, such injunctions arise due to a court’s erroneous conflation of the legal basis for its holding (*i.e.*, its conclusion that a federal policy or action is facially unconstitutional) with the proper scope of injunctive relief (*i.e.*, a nationwide injunction).

preliminary injunction against sanctuary city order as applied to Byrne grants), *stay denied*, 2017 U.S. Dist. LEXIS 169518, at *6-18 (N.D. Ill. Oct. 13, 2017) (affirming decision to issue nationwide injunction); *cf.* *City of Philadelphia v. Sessions*, No. 17-3894, 2017 U.S. Dist. LEXIS 188954, at *191 (E.D. Pa. Nov. 15, 2017) (issuing preliminary injunction only requiring the government to pay Byrne grants to the City of Philadelphia).

⁴ *Texas v. United States*, 86 F. Supp. 3d 591, 677-68 & n.111 (S.D. Tex. 2015), *aff’d* 809 F.3d 134 (5th Cir. 2015), *aff’d* 136 S. Ct. 2271 (2016), *reh’g denied* No. 15-674, 2016 U.S. LEXIS 4754 (U.S. Oct. 3, 2016).

⁵ *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016), *appeal dismissed*, 679 F. App’x 320 (5th Cir. Feb. 9, 2017).

⁶ *Halbig v. Burwell*, 758 F.3d 390, 393-94 (D.C. Cir. 2014), *vacated, reh’g en banc granted*, No. 14-5018, 2014 U.S. App. LEXIS 17099, at 3 (D.C. Cir. Sept. 4, 2014) (en banc), *dismissed*, No. 14-5018, 2015 U.S. App. LEXIS 16286, at 3 (D.C. Cir. July 9, 2015) (en banc).

Definition of Nationwide Injunctions

As an initial matter, it is important to clarify the meaning of “nationwide injunction.” In one sense, most injunctions can be considered “nationwide” because they generally prohibit a defendant from engaging in certain actions, or otherwise violating a plaintiff’s rights, anywhere in the nation, not just within the geographic jurisdiction of the court that issued it. The nationwide aspect of most injunctions seldom raises serious concerns, however, because they govern only the rights of the particular litigants actually before the issuing court, who are bound by the court’s ruling—and prevented from re-litigating the same legal questions in other courts—as a matter of *res judicata*. Despite the nationwide enforceability of such injunctions *between those particular litigants*, third parties remain free to relitigate the same issues before other courts, allowing other circuits to apply their own precedents to rightholders within their respective jurisdictions and potentially reach different conclusions on important legal issues.

The term “nationwide injunction” is more commonly used to refer to an order that purports to prevent a federal agency or official from enforcing a federal law, regulation, executive order, or other policy against any person, anywhere in the nation. There are two ways in which a nationwide injunction in this sense of the term may arise. **First**, a court may certify a nationwide class of all adversely affected rightholders and then, when the plaintiffs succeed in their constitutional challenge, issue an injunction prohibiting the Government from enforcing the challenged legal provision against any members of the plaintiff class. Such orders may be called “Nationwide Class Injunction.” As discussed below, the problem in such cases does not arise from the injunction itself, but rather the court’s decision to certify a nationwide class.

Second, in a non-class case, a court may decide to issue an injunction completely prohibiting the Government from enforcing the challenged legal provision against anyone,

anywhere in the nation, including third-party non-litigants not before the court. Such orders may be called “Defendant-Oriented Injunctions.” As discussed below, they raise a wide range of jurisdictional, legal, and concerns and should generally be avoided. Nationwide Class Injunctions and Defendant-Oriented Injunctions are the two types of nationwide injunctions that warrant congressional attention.

It is a basic principle of remedial law that a court may grant appropriate relief to the plaintiffs before it. Consequently, when considering nationwide injunctions, it is critically important to distinguish between class actions and non-class cases. These types of cases raise very different concerns and require different types of solutions.

**In Rule 23(b)(2) Class Actions Challenging the Validity of
Federal Legal Provisions, Courts Should Limit the Geographic
Scope of Plaintiff Classes to Avoid Issuing Nationwide Injunctions**

Federal Rule of Civil Procedure 23(b)(2) allows federal courts to certify class action suits where the plaintiffs seek “injunctive relief” that is “appropriate respecting the plaintiff class as a whole.” Fed. R. Civ. P. 23(b)(2). This rule was promulgated specifically to facilitate civil rights and similar constitutional challenges. *See* Fed. R. Civ. P. 23 advisory committee’s note—1966 Amendment.

In a class action, including a Rule 23(b)(2) class action, all affected rightholders who are members of the certified plaintiff class are considered party litigants before the court. It is therefore appropriate for a court to grant injunctive relief to enforce the rights of the entire plaintiff class. If a district court certifies a nationwide class of all affected rightholders, as the Supreme Court has held district courts may do, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979), the court may enter a nationwide injunction—a Nationwide Class Injunction—prohibiting the Government from applying the challenged legal provision to any rightholder, anywhere in the nation.

Thus, the main issue in class actions is not so much the proper scope of injunctive relief, but rather the proper scope of the plaintiff class. Because Nationwide Class Injunctions are inconsistent with the structure of the federal judiciary, *a federal district court should generally refrain from certifying nationwide classes under Fed. R. Civ. P. 23(b)(2)*, and instead certify only district- or circuit-wide classes, which would accordingly limit the scope of any injunctive relief it issues. See generally Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929656.

Nationwide Class Injunctions are inappropriate for several reasons. *First*, in *United States v. Mendoza*, 464 U.S. 154, 162 (1984), the Supreme Court held that the Government is not subject to non-mutual offensive collateral estoppel. This means that, if one plaintiff obtains a favorable court ruling holding that a certain legal provision is unconstitutional, a different plaintiff in a different jurisdiction may not use that ruling against the Government. Rather, the Government is entitled to re-litigate the same issue against other litigants in other circuits, which are free to develop their own bodies of precedent until the U.S. Supreme Court definitively resolves the issue. Allowing Nationwide Class Injunctions effectively strips the Government of this protection against non-mutual offensive collateral estoppel. With a Nationwide Class Injunction, a single adverse ruling from a single court against the Government extends to all rightholders throughout the nation, barring the Government from relitigating the same issue in other jurisdictions.

Second, Nationwide Class Injunctions “substantially thwart the development of important questions of law by freezing the first final decision” invalidating a particular legal provision. Cf. *Mendoza*, 464 U.S. at 160. They make it far less likely that circuit splits will develop, preventing

issues from “percolating” through the judiciary and depriving the Court of the opportunity to observe the practical consequences of different judicial approaches in different jurisdictions.

Third, Nationwide Class Injunctions effectively force the Government to appeal “every adverse decision in order to avoid foreclosing further review.” *Cf. id.* at 161. The Supreme Court has recognized that the Government generally exercises broad discretion in deciding whether to appeal cases, particularly when selecting matters to present to the Supreme Court. Nationwide Class Injunctions effectively compel the Government to appeal every adverse constitutional ruling, regardless of whether the factual circumstances of the case make it the best vehicle for considering the underlying legal issue. Such injunctions likewise make it almost obligatory for the Court to grant *certiorari*, since they nullify the challenged legal provisions throughout the nation.⁷

Finally, and perhaps most importantly, Nationwide Class Injunctions are in tension with the decentralized structure of the federal judicial system. The nation is divided into 94 federal judicial districts and 12 geographic circuit courts of appeal (in addition to the specialized U.S. Court of Appeals for the Federal Circuit). Each district court exercises jurisdiction over a limited geographic area, and a circuit court’s rulings are considered binding law only in the districts that fall within that circuit. A Nationwide Class Injunction allows a single district judge to impose her view of the law—guided by the rulings of her circuit court—across the entire nation, including on rightholders in other jurisdictions whose claims would otherwise be governed by the law of other circuits. It is especially pernicious when this occurs in Rule 23(b)(2) class actions because affected rightholders are not even guaranteed the right to receive notice of the suit or an opportunity to opt

⁷ Nationwide Class Injunctions also make it easier for one Administration to entrench its views of the Constitution, precluding future Administrations from adopting different interpretations. If a district court enters a Nationwide Class Injunction, an Administration may give that ruling permanent nationwide effect simply by declining to appeal it. Because “choices . . . made by one administration” are “often reevaluated by another administration,” the Supreme Court has held that “courts should be careful” in preventing the Government from re-litigating important legal issues. *Mendoza*, 464 U.S. at 161-62.

out. *See* FED. R. CIV. P. 23(c)(2)(A). The structure of the federal judicial system strongly suggests that a single district judge should not be permitted to bind the Government with regard to rightholders throughout the nation, including in other jurisdictions where that judge’s interpretation of the Constitution lacks the force of binding law. For these reasons, when a district court certifies a Rule 23(b)(2) class, it generally should include only rightholders within that district or circuit, rather than extending throughout the nation.

In Non-Class Cases, a Court Should Generally Issue “Plaintiff-Oriented Injunctions” Enforcing the Rights of the Plaintiffs Before the Court, Rather than “Defendant-Oriented Injunctions” Completely Barring Enforcement of the Challenged Provision Against Anyone

In non-class cases, courts generally should refuse to issue nationwide Defendant-Oriented Injunctions, unless the case involves “indivisible” rights. When only particular rightholders are before the court as plaintiffs, rather than a Rule 23(b)(2) plaintiff class, the proper remedy is a “Plaintiff-Oriented Injunction” enforcing only the rights of those plaintiffs. Courts nevertheless frequently choose to instead issue “Defendant-Oriented Injunctions,” completely prohibiting the Government defendants from enforcing the challenged legal provision against anyone, anywhere in the nation, including third-party non-litigants who are not before the court.

Some cases, such as redistricting challenges or school desegregation lawsuits, involve “indivisible rights,” meaning it is impossible to enforce only certain plaintiffs’ rights without thereby enforcing the rights of other people as well. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04(a)-(b) (2010). For example, when an individual plaintiff successfully challenges a congressional redistricting scheme, the court must order that the affected districts be redrawn for everyone—there cannot be one set of congressional districts for that plaintiff and a different set for everyone else. Most cases, however, involve “divisible” rights, in which it is fully possible to enforce a challenged legal provision to everyone except certain

plaintiffs. Carving out individual exceptions to a federal statute, regulation, or policy may raise serious logistical or practical concerns for the agency charged with enforcing it, but such policy concerns are for the agency itself to address, and do not empower a court to automatically extend its injunction to all rightholders across the nation.

In cases involving divisible rights, nationwide Defendant-Oriented Injunctions not only raise all of the concerns discussed above that strongly counsel against Nationwide Class Injunctions, but suffer from several other infirmities, as well. **First**, perhaps most importantly, Defendant-Oriented Injunctions likely violate Article III limits on courts' power. Under Article III, a plaintiff generally has standing to seek relief such as an injunction only if it will redress harm the plaintiff itself has suffered; a plaintiff is usually not permitted to seek protection to enforce the rights of third-party non-litigants. A Plaintiff-Oriented Injunction, by definition, is sufficient to resolve the case or controversy before a court and resolve the plaintiff's claims. Because Plaintiffs usually lack standing to seek Defendant-Oriented Injunctions, federal courts lack jurisdiction to grant them.

Second, Defendant-Oriented Injunctions raise serious due process concerns, by allowing courts to enforce the rights of third-party nonlitigants in other jurisdictions who have not received notice of the proceedings and an opportunity to be heard, and over whom the court lacks personal jurisdiction. **Third**, Defendant-Oriented Injunctions raise serious fairness concerns because they give rise to asymmetric claim preclusion. If a plaintiff's constitutional challenge to a legal provision fails, other plaintiffs may still bring identical challenges, even in the same court (especially because district court rulings generally have no *stare decisis* effect, including within the same judicial district). Conversely, if even a single plaintiff's challenge succeeds, a Defendant-Oriented Injunction prevents the Government from relitigating the issue or enforcing the

challenged provision against anyone, anywhere in the nation. In other words, third-party non-litigants stand to benefit from favorable rulings in cases in which they're not involved, but face no risk of claim preclusion from adverse rulings in such matters.

Fourth, Defendant-Oriented Injunctions undermine Federal Rule of Civil Procedure 23 by collapsing the distinction between class actions and non-class cases. **Finally**, as discussed earlier, such injunctions allow individual federal district judges to impose their interpretations of the law on rightholders throughout the nation, including those living in other circuits whose claims should be governed by the binding precedents of those other circuits. This exacerbates the consequences of forum shopping exponentially; if a plaintiff can find even a single outlier district judge or two-judge majority on a circuit panel to side with them, it can completely invalidate a legal provision throughout the country. See generally Michael T. Morley, *Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728724. Thus, federal courts generally should award only Plaintiff-Oriented Injunctions, enforcing the rights of the plaintiffs before it, rather than Defendant-Oriented Injunctions, completely barring the Government from enforcing the challenged legal provision against anyone, in non-class cases involving divisible rights.

Potential Legislative Solutions

Nationwide injunctions may be cabined through many different means. Most basically, the U.S. Supreme Court could hold that nationwide classes and nationwide injunctions constitute abuses of discretion and reverse lower court decisions issuing, certifying, or affirming them. It is debatable, however, whether the Court would view such measures as an unwarranted limitation on the judiciary's power to "check" other branches of Government. Moreover, such holdings would

require the Court to limit or overturn *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979), which principles of *stare decisis* counsel against.

Alternatively, Federal Rules of Civil Procedure 23 and 65 could be amended to prohibit, or heavily restrict, certification of nationwide classes and issuance of nationwide injunctions, respectively. Such changes would at least arguably raise questions under the Rules Enabling Act, which provides that the rules “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). Substantial disagreement exists over whether remedies are properly characterized as substantive or procedural. While amending the rules would be an improvement over the status quo, proceeding in that manner would generate unnecessary uncertainty and litigation until the Supreme Court confirmed the amendments’ validity.

The most attractive alternative would be for Congress to enact legislation, which would be valid under the Inferior Courts Clause, U.S. CONST. art. I, § 8, cl. 9, read in conjunction with the Necessary and Proper Clause, *id.* art. I, § 8, cl. 18. *See* *South Carolina v. Regan*, 465 U.S. 367, 395-96 (1984). Measures similar to the following three proposals would address the issue:

I. Title 28 – Part V. Procedure – Chapter 114. Class Actions

[new provision] 28 U.S.C. § 1716 - Geographic Scope of Class Certification

Unless otherwise required by the U.S. Constitution or some other provision of applicable law, when a district court certifies a class pursuant to Federal Rule of Civil Procedure 23(b)(2) in which the plaintiff or plaintiffs challenges the validity, proper interpretation, or application of a federal statute, regulation, executive order, policy, agency issuance, or other legal provision, the class definition shall not include members residing outside of the federal circuit in which the court sits and whose claims or alleged injuries-in-fact, if any, arise from activities, events, conduct, or transactions outside of that circuit.

Explanation: This proposal limits the geographic scope of Rule 23(b)(2) classes that district courts may certify in constitutional and related public-law cases seeking injunctive relief, thereby restricting the court’s ability to issue nationwide injunctions in such cases.

**II. Title 28 – Part VI. Particular Proceedings –
Chapter 155. Injunctions; Three-Judge Courts**

[new provision] 28 U.S.C. § 2285 – Nationwide Defendant-Oriented Injunctions Prohibited

(a) Unless otherwise required by the U.S. Constitution or some other provision of applicable law, any injunction issued by a U.S. district court shall be tailored to enforce only the rights of the plaintiff, plaintiffs, or plaintiff class before the court, and shall not be unnecessarily extended further to enforce the rights of third-party non-litigants.

(b) A court shall not issue a nationwide injunction or other injunction enforcing the rights of third-party non-litigants on the grounds that narrower relief would be administratively burdensome, costly, or inconvenient for the enjoined person or entity.

(c) Courts shall determine the geographic scope and applicability of injunctions with due regard for the prerogative of other circuits to adopt differing views of the underlying legal issues and apply their own precedents to the claims of rightholders within their respective jurisdictions.

(d) In any case in which a plaintiff entity asserts associational standing, the “plaintiffs” for purposes of Subsection (a) shall be deemed to be that entity’s members who had been harmed, or faced an imminent likelihood of harm, from the legal provision or provisions at issue as of the time the court issues the injunction. The plaintiff entity shall provide a list of those members to the court, and it shall be appended to any injunction the court issues.

(e) The terms “plaintiff,” “plaintiffs,” and “plaintiff class” shall include counterclaimants, cross-claimants, and third-party plaintiffs, as appropriate, when such entities seek injunctive relief from the court.

Explanation: This provision would prohibit courts from issuing nationwide injunctions in non-class cases, and seeks to prevent the issuance of “backdoor” nationwide injunctions in cases brought by private organizations asserting associational standing.

III. Title 28 – Part VI. Particular Proceedings – Chapter 190. Miscellaneous

[new provision] 28 U.S.C. § 5001 – Precedential Effect of District Court Opinions

(a) Unless and until it is reconsidered, reversed, or vacated, an opinion of a district court issued in connection with a case over which it has properly exercised subject-matter jurisdiction shall be entitled to the same stare decisis effect within that judicial district as an opinion of a three-judge merits panel of the U.S. Court of Appeals for that circuit would have within that circuit.

(b) Subsection (a) shall have no effect on whether a district court opinion shall be deemed capable of “clearly establishing” the law on any issue for any qualified immunity purposes.

Explanation: This provision at least somewhat alleviates the need for district courts to certify classes or issue broad injunctive relief by giving their opinions precedential effect within their respective districts. Subsection (b) ensures this proposal does not have unexpected or undesired consequences in suits for monetary relief against governmental entities under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), or § 42 U.S.C. 1983.