WRITTEN STATEMENT OF PAUL J. LARKIN
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HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, ARTIFICIAL INTELLIGENCE, AND THE INTERNET AND
SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT
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Mr. Chairman, Mr. Ranking Member, and members of the committee:

My name is Paul J. Larkin. I am the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow at The Heritage Foundation. Thank you for the opportunity to submit this testimony on the legitimacy and wisdom of so-called "nationwide injunctions": viz., orders that award relief, not only to the parties in a lawsuit, but also to strangers to the litigation.[1] The practice of entering such injunctions in cases not certified as class actions has bedeviled each of the five presidential administrations in this century.[2] That practice also is mistaken as a matter of law and unwise as a matter of policy.[3]

I. NATIONWIDE INJUNCTIONS ARE MISTAKEN AS A MATTER OF LAW

Most of the Constitution's text addresses the creation, selection, empowerment, and regulation of the Article I and II branches. Those provisions grant exclusive lawmaking authority to politically elected officials: members of Congress and the President. Articles I and II create the House of Representatives, the Senate, and the

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[1] That term is misleading. A prevailing party can rely on a final judgment anywhere. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952); Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452 (1932). The current tranche of nationwide injunctions seeks to benefit nonparties to litigation against the federal government.

[2] U.S. Department of Justice figures reveal that there were six nationwide injunctions during the George W. Bush Administration, 12 during the Obama Administration, 64 during the first Trump Administration, and 14 during the Biden Administration. *Developments in the Law: Court Reform*, Ch. 4—Nationwide Injunctions, 137 HARV. L. REV. 1701, 1705 Tbl. 1 (2024). Numerous additional ones have been entered in the second Trump Administration. Paul J. Larkin & GianCarlo Canaparo, *The Unitary Executive Meets the Unitary Judiciary: The Use of Nationwide Injunctions by U.S. District Courts*, HERITAGE FOUND., Legal Memorandum No. 375, at 3, 18 n.26 (2025) [hereafter Larkin & Canaparo, *Unitary Judiciary*] (collecting examples).

[3] I have published two articles on this issue. Larkin & Canaparo, *Unitary Judiciary*, *supra* note 2; Paul J. Larkin & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55 (2020) [hereafter Larkin & Canaparo, *One Ring*]. I will draw upon those articles in my statement here. For your convenience, I have attached them as an appendix to this statement

President; they identify and limit who may hold such offices; and they define the powers that each one may exercise, with the most important one being the creation and implementation of the "Law" of the United States.

Article I vests "[a]ll legislative Powers herein granted" in Congress, which textually distinguishes what Congress can produce from the type of orders or judgments that courts may enter, and Article II vests in the President the "executive Power," which includes the responsibility to "take Care that the Laws be faithfully executed." The Framers spent far less time at the Convention of 1787 on the Article III branch, but they did define and limit the power that the federal courts may exercise: *viz*., the "judicial Power." That is the authority to adjudicate pursuant to "Trial[s]" certain specified types of "Cases" and "Controversies" in "Law and Equity, arising under" the Constitution, the acts of Congress, and treaties.[4] Nowhere in Article III is there a hint that the "judicial Power" vested in the federal courts over "Cases" and "Controversies" is identical to the "legislative Power" vested in Congress or that federal courts may enter a judgment that is comparable to the "Law" that only the political branches may create. The reason is that the Framers were aware of the difference between the legislative and adjudicatory processes, the Framers assigned different powers to the different branches to avoid any one of them from becoming an autocrat, and the Constitution's terms must be read in light of the Framers' knowledge and purpose.[5]

Read as a whole,[6] those provisions show that the Framers distinguished between (1) a "Law" passed by Congress and signed by the President, and (2) a judgment or order entered by an English common law court or one of today's federal courts. The former are legislative products that govern the nation by representatives chosen by the electorate for limited terms to decide policy issues on a nationwide basis. By contrast, the latter merely represent the adjudication by an unelected judge of a dispute between two parties in one lawsuit that "aris[es] under" the laws passed by Congress. A "Law" may include a directive to society to act or refrain from acting in a certain manner in accordance with its text, which applies to everyone.[7] By contrast, an injunction is a coercive remedy used to enforce a court's judgment by commanding a losing party in a lawsuit to act or refrain from acting in a certain way. Judgments that closely resemble "Law[s]"—the infamous *Miranda* warnings are a paradigmatic example[8]—exceed the authority of the courts, whose remedial power is limited to entry of a judgment resolving a specific case rather than the promulgation of rules for the overall governance of society. As Professor Samuel Bray has put it, "Article III gives the federal courts the 'judicial Power,' which is a power to

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[4] U.S. CONST. arts. I, II, III; Larkin & Canaparo, *supra* note 2, at 4-5.

[5] *See*, *e.g*., Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (stating that the Judiciary Act of 1789 gave federal courts the "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.") (quoting Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 568 (1939)).

[6] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (arguing that the Constitution should be read holistically).

[7] United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law.").

[8] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

decide cases for parties, not questions for everyone."[9] The Framers' decision to limit the federal courts to the micro-lawmaking that was the traditional work of the common-law courts—rather than the macro-lawmaking that is the responsibility of legislatures—is powerful evidence that federal courts may use an injunction to remedy only the injury suffered by the parties, not the nation. [10]

In demarking this assignment of responsibilities, the Framers were aware of and rejected alternatives that would have permitted federal courts to participate with Congress and the President in the lawmaking process.[11] For example, before 1066, the Anglo–Saxon kings relied on a council of elders, called the Witan, to determine the governing tribal customs. After William I became king, the Witan became the Curia Regis (or King's Court), which possessed legislative, executive, and judicial power. Over time, the Star Chamber, a court of general jurisdiction consisting of the king's councilors and common-law judges, emerged within the Privy Council, a group of the king's general advisors. Even after Parliament stripped the Privy Council of its adjudicative power during the English Civil War, the council still dispensed justice and reviewed colonial legislation adopted in America's 13 colonies. The House of Lords possessed judicial and legislative power by serving as the highest court in England and one branch of a bicameral Parliament. Thus, English law saw nothing improper in the same body possessing lawmaking, law-enforcing, and law-adjudicating authority. There also was a local example available to the Framers. The New York Constitution of 1777 created a Council of Revision that contained judges as members and possessed veto and revisionary power over legislation. In sum, English and colonial law saw nothing improper in vesting lawmaking, law-enforcing, and law-adjudicating responsibilities in one institution.[12]

The courts that have approved nationwide injunctions have confused the critical difference between the law of judgments and the principles of stare decisis. A case can result in a judgment only if it "aris[es] under" federal law, and that is true only if the Constitution, an act of Congress, or a treaty creates that law. A judgment

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[9] Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421 (2017) (footnote omitted). A trial or appellate court's resolution of a dispute often requires the judge to apply settled law to new facts, or to decide an unresolved legal issue, and the judgment entered in the case establishes the law between the partes. But that lawmaking occurs only at the micro level—that is, only for the parties to the case. That is what Justice Oliver Wendell Holmes meant by saying that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[10] "What that means is this: in a criminal prosecution, a federal court can enter a judgment before trial that dismisses charges improperly brought. After trial, the court can order the accused to be punished or freed, depending on the jury's verdict, and impose a punishment identified by Congress in the act creating a criminal offense. In a civil action, a court can award the same type of monetary or injunctive relief available in England at law or equity when this nation came into being. That is all. The Article III adjudicative power vested in federal courts is not a charter to substitute appointed judges for elected officials. Nationwide injunctions differ markedly from the remedies contemplated by Article III because the former exceed the party-specific reach of the judgment and partake more of legislation." Larkin & Canaparo, *supra* note 15, at 61–62 (footnotes omitted).

[11] *See* James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235 (1989); Larkin & Canaparo, *Unitary Judiciary*, *supra* note 2, at 6.

[12] Barry, *supra* note 11, at 237-43; Larkin & Canaparo, *Unitary Judiciary*, *supra* note 2, at 6.

simply reflects a court's determination as to the best interpretation of federal law or the best application of that law to the facts of a particular case. Once a court enters its judgment, that judgment binds only the parties, not strangers to the litigation. What can affect third parties is the doctrine of stare decisis—*viz*., the principle that a legal rule, once settled, should be applied in future cases.[13] In a federal system like ours, one with numerous vertical and horizontal lines of jurisdiction, the stare decisis doctrine does not apply nationwide unless the Supreme Court has resolved an issue.[14] No particular circuit court of appeals can bind another one, and no district court can bind any other court—or even its own.[15] For example, a person in Maine (which is under the U.S. Court of Appeals for the First Circuit) can argue that *the law applied* in a case litigated to a final judgment in a Hawaii district court (which is under the U.S. Court of Appeals for the Ninth Circuit) was correct and should be applied by the Maine federal courts. But that person cannot claim an entitlement to prevail based entirely on the *judgment* entered by the Hawaii federal court if he or she was not a party to the litigation resolved by that judgment. Only a victorious party named in the Hawaii judgment can do so.[16]

Nor does the Judicial Code grant federal courts the power to transform a "judgment" into a "Law," despite what some judges have decided. None of the jurisdictional statutes implementing the Article III "Case" or "Controversy" limitation authorizes courts to grant relief to third parties that is equal to what Congress may accomplish through a generally applicable "Law." Also, declaratory relief was unknown to the common law, and when Congress passed the Declaratory Judgment Act to offer courts that authority, Congress limited the recourse to only the parties in a lawsuit by providing that, "[i]n a case of actual controversy within its jurisdiction," a federal court "may declare the rights and other legal relations of any interested *party* seeking such declaration."[17] Rule 23 of the Federal Rules of Civil Procedure allows for the certification of a nationwide class,[18] but a court cannot award nationwide relief without first certifying a nationwide class.[19] Rule 65 of the Federal Rules of Civil Procedure, which governs "Injunctions and Restraining Orders," fixes necessary and sufficient criteria for entry of such relief and does not empower courts to enjoin people who are not parties to the case.[20] Beyond that lies the realm of nationwide lawmaking, which is the exclusive responsibility of Congress.

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[13] *See*, *e.g*., Ramos v. Louisiana, 590 U.S. 83, 101-11 (2020) (plurality opinion); *id*. at 115-24 (Kavanaugh, J.,).

[14] *See*, *e.g*., Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 406 (2024) (noting that "lower courts [are] bound by even our crumbling precedents").

[15] Larkin & Canaparo, *Unitary Judiciary*, *supra* note 2, at 7.

[16] *Id*.

[17] 28 U.S.C. § 2201 (West 2025) (emphasis added).

[18] *See* Califano v. Yamasaki, 442 U.S. 682, 699-700 (1979).

[19] *See* Baxter v. Palmigiano, 425 U.S.308, 311 n.1 (1976) (ruling that a district court erred by entering classwide relief without first properly certifying a class).

[20] Rule 65 provides in part as follows:

> **(d) Contents and Scope of Every Injunction and Restraining Order.**
>
> **(1)** ***Contents.*** Every order granting an injunction and every restraining order must:
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> **(A)** state the reasons why it issued;

Two Supreme Court decisions—*Williams v. Zbaraz*[21] and *United States v. Mendoza*[22]—also stand in the way of the current practice of issuing nationwide injunctions. The plaintiffs in *Zbaraz* challenged the constitutionality of an Illinois law that declined to fund elective abortions on the ground that the statute denied an indigent woman the right to obtain an abortion under the law created in *Roe v. Wade*.[23] The plaintiffs did not claim that the federal Hyde Amendment also infringed on their rights even though it imposed a parallel limit on federal reimbursement for elective abortions. Nevertheless, the district court believed that the two statutes were closely interrelated and held both laws unconstitutional. The Supreme Court reversed, ruling that the district court "lacked jurisdiction to consider the constitutionality of the Hyde Amendment" for two reasons: None of the plaintiffs in *Zbaraz* had challenged the constitutionality of the Hyde Amendment, and the district court could have awarded the plaintiffs complete relief by entering an order that said nothing about the validity of that law.[24] Under those circumstances, the Court reasoned, there was no "case or controversy sufficient to permit an exercise" of the Article III judicial power.[25]

Zbaraz stands for the proposition that a district court lacks jurisdiction to grant relief to a prevailing party on an issue not in dispute in that case and unnecessary to fully remedy the plaintiff's injury. It follows logically that a district court lacks jurisdiction to award relief to a nonparty as to whom there is, by definition, no "Case" or "Controversy" between that party and anyone else. If there was no controversy in *Zbaraz* between the plaintiffs and the United States, as the Supreme Court held, there also would be no controversy between anyone on the sidelines of a lawsuit and the federal government. Members of the public might vociferously object to whatever action the government might be taking toward a party to litigation, and they might even have a legitimate claim of injury that would permit them to file their own lawsuit. But unless and until they become a party to an ongoing lawsuit or file one of their own, strangers have no greater entitlement to an injunction based on the judgment of an Article III court than they would have if they bested a government representative in a law school debate.

The second case is *United States v. Mendoza. Mendoza* involved the issue of whether a nonparty who does file a new lawsuit may make offensive collateral

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> **(B)** state its terms specifically; and
>
> **(C)** describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.
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> **(2)** ***Persons Bound.*** The order binds only the following who receive actual notice of it by personal service or otherwise:
>
> **(A)** the parties;
>
> **(B)** the parties' officers, agents, servants, employees, and attorneys; and
>
> **(C)** other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

[21] 448 U.S. 358 (1980).

[22] 464 U.S. 154 (1984).

[23] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[24] *Zbaraz*, 448 U.S. at 367.

[25] *Id*. at 367.

estoppel use of a judgment adverse to the federal government that was entered in prior litigation.[26] In *Parklane Hosiery Co. v. Shore*,[27] the Supreme Court had approved the use of offensive collateral estoppel as a matter of federal law in litigation involving private parties, and the plaintiff in *Mendoza* sought to extend that rule to cases brought against the United States. The Supreme Court, however, unanimously rejected his argument. The federal government is not an ordinary litigant in federal cases, the Court reasoned, because it is a party to a far larger number of lawsuits than any private party would be and because many constitutional issues arise only in the context of public litigation against the federal government.[28] Moreover, making every case a "Win or go home" enterprise for the federal government would hamper the Supreme Court's own decisionmaking process, because it would prevent the development of issues in the lower courts, often in multiple circuits, before the Court would need to resolve a dispute. Allowing issues to "percolate" in the lower courts, the Court reasoned, had the cost of delaying the final resolution of an issue, but also had the overriding benefit of ensuring that every aspect of an issue, along with every argument pro and con, would be fully aired before the Court needed to step in. Those factors persuaded the Court that allowing a nonparty to bind the federal government whenever it lost a case would have serious adverse consequences for the legal system.

Mendoza nicely complements *Zbaraz*. *Mendoza* ensures that no single adverse judgment can foreclose the federal government from implementing a statute or operating a program in connection with individuals not named in the judgment. *Mendoza* also avoids the unseemly forum shopping and asymmetric development of the law that a contrary rule would encourage. Keep in mind that there are hundreds of federal district court judges, and institutional litigants have every incentive to find one to rule in their favor. Congress has the power to decide whether to overrule or modify the *Mendoza* decision, because Congress can change the rules of issue or claim preclusion for the federal courts.[29] That would require Congress to legislate, to pass a "Law," which it has not yet done—and should not do now.[30]

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[26] Collateral estoppel (nowadays the term "issue preclusion" is used instead) refers to a doctrine providing that an issue resolved between the parties in one case should be deemed resolved in a later case involving the same issue. For example, if *A* sues *B* over title to property *C*, a final judgment in the case that *B*'s name is on the deed should apply in any later litigation between those parties over title to that property in subsequent litigation. *See* Larkin & Canaparo, *Unitary Judiciary*, *supra* note 2, at 11.

[27] 439 U.S.322 (1979).

[28] *Id*. at 159.

[29] "Issue preclusion" is discussed above in footnote 24. "Claim preclusion (the new name given to the old doctrine known as *res judicata*) is different. If *A* claims that he, not *B*, owns Property *C*, *A* must present in one lawsuit every reason why he is the owner—e.g., *A* bought the property from *B*, *B* gave the property to *A* as a birthday present—or forfeit the opportunity to present that rationale for his entitlement to Property *C* in subsequent litigation.

[30] A different case might be presented by a statute creating a three-judge court to resolve an issue of nationwide importance where a direct appeal from entry of a nationwide injunction would leap from over the circuit courts of appeals and go directly to the Supreme Court. Perhaps, that would pose a different case; perhaps not. As explained above, one problem with the entry of an injunction against a non-party is that, given the reasoning in the *Zbaraz* case, discussed in the text at Pages 5-6, there is no "Case" or "Controversy" between a litigant and a non-party. Regardless, only Congress could enact such a scheme.

II. Nationwide Injunctions Are Unwise as a Matter of Policy

It is unlikely that Congress could authorize federal courts to issue nationwide injunctions outside of nationwide class actions.[31] The *Zbaraz* case indicates that a federal court cannot do so because there is no "Case" or "Controversy" between the parties to a lawsuit and individuals or organizations watching from the sidelines. But, even if Congress could empower courts to award nationwide injunctions outside of nationwide class actions, it would be a mistake for Congress to change the rule adopted in the *Mendoza* case, for the reasons spelled out in that decision and noted above. One of those reasons, however, deserves special attention.

The ability to persuade a district judge to enter a nationwide injunction without certification of a nationwide class action exposes the federal judicial system to the unavoidable criticism that it is susceptible to "judge shopping" to obtain "one ring to rule them all," as I have previously noted.[32] That problem is a serious one. "As a consequence of increased forum shopping and political gamesmanship, the increase in nationwide injunctions on highly politicized issues fuels the public's perception that the courts themselves are politicized and that federal judges are political actors." [33] The corrosive effect that belief would have on the public's perception of our judicial system doubtless would only grow stronger over time. "Inserting the judiciary into quintessentially political fights, even when there is a substantial legal issue to be decided on recognizably legal grounds, plainly risks the perception that judges base decisions on political preferences, or at least are affected by those preferences," former Dean Ron Cass has warned.[34] Overturning the Supreme Court's ruling in *Mendoza* by statute would only drive our judicial system toward a future that no one should want to see.

Conclusion

The practice of entering nationwide injunctions against the federal government in any case not properly certified as a nationwide class action is both unlawful and unwise. Neither the Constitution, the Judicial Code, nor common-law principles of issue or claim preclusion authorizes a federal court to award relief to individuals who are not parties to a particular "Case" or "Controversy." In fact, the Constitution implicitly but clearly prohibits any such practice by denying the judiciary the power either to enter a judgment that is tantamount to a "Law," which only Congress may pass, or to grant nonparties injunctive relief, which would exceed the "Case" or "Controversy" limitations placed on the federal judiciary by Article III. In my

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[31] Nationwide class actions differ from ordinary litigation because they signal to the parties, their lawyers, and the nation that there will be only one lawsuit to resolve an issue for the country. Moreover, there are standards that are set forth in Rule 23 of the Federal Rules of Civil Procedure that a plaintiff must meet before a judge can certify a class action.

[32] Larkin & Canaparo, *One Ring*, *supra* note 2.

[33] *Developments*, *supra* note 1, at 1712 (footnote omitted).

[34] Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 Geo. Mason L. Rev. 29, 53-54 (2019) (footnote omitted); *Developments*, *supra* note 1, at 1712 ("When judges in the red state of Texas halt Obama's policies, and judges in the blue state of Hawaii enjoin Trump's, it tests the limits of the public's imagination to argue that the federal judiciary is impartial, nonpartisan, and legitimate.") (footnote and punctuation omitted).

opinion, the Supreme Court is certain to reach that conclusion when it decides to review such a lower court judgement, which will hopefully happen very soon.