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## Abusing the Judicial Power: A Geographic Approach to Address Nationwide Injunctions and State Standing

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# **ABUSING THE JUDICIAL POWER: A GEOGRAPHIC APPROACH TO ADDRESS NATIONWIDE INJUNCTIONS AND STATE STANDING**

## **ABSTRACT**

*The judicial branch's primary function in a tripartite system of government is to institute checks and balances on the executive and legislative branches by interpreting and applying the law. This command is limited under Article III of the Constitution, which gives federal courts the power to decide only a limited set of cases and controversies. Article III judges are appointed and confirmed with life tenure. This system of life appointments evidences the Framers' intent to preserve the federal judiciary as a body of insulated, apolitical decision-makers as opposed to a third political arm of the federal government. For over two centuries, the nation's judicial system has been a revered institution of law and order, maintaining the public's confidence in the administration of justice. The recent and increasing use of nationwide injunctions, which implement expansive theories of state standing and equitable power, puts this notion in jeopardy.*

*In the context of nationwide injunctions, state attorneys general are forum shopping to bring suits to the most sympathetic ears. In doing so, state attorneys general have asserted attenuated forms of standing to have their cases heard. Because these state actors are specifically seeking out the most favorable district court, they are in a greater position to find a court willing to expand the limits of standing and equity to hear their case. The idea that an injunction should be a primary means of seeking redress is a relatively new development advanced in a sharply divided political climate. To preserve and protect the role of the judicial branch, some measures must be taken to dissuade state actors and federal courts from abusing the judicial power.*

*This Comment explores how the traditional limitations of standing and equity are being vastly expanded by recent nationwide injunctions. Much of the blame for this expansion rests on individual state attorneys general and sympathetic district judges. In identifying these individuals as the root cause of such expansion, this Comment specifically tailors a solution by advocating for federal legislation that places limitations on district courts hearing cases initiated by state actors seeking nationwide injunctions.*

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## INTRODUCTION

The growing use of “nationwide injunctions” by federal courts presents a threat to the separation of powers and has frustrated some of the most significant executive policies of both the Obama and Trump Administrations.<sup>1</sup> Nationwide injunctions, also commonly referred to as “universal” or “national” injunctions, are non-class action lawsuits that “purport to bar the federal government from enforcing a law or policy as to any person or organization, anywhere in the United States,” as opposed to a traditional injunction that only applies to the plaintiffs of the case.<sup>2</sup> This practice is a more recent phenomenon in which “courts have gradually assumed the power to enter national injunctions against federal statutes and regulations.”<sup>3</sup> Recent cases implementing nationwide injunctions expose two glaring issues. First, courts have accepted relaxed views of standing, particularly in the context of state actors seeking to enjoin executive policies.<sup>4</sup> Second, courts have acted contrary to traditional notions of equity by turning the extraordinary instance of an injunction applied to non-parties into the new norm.<sup>5</sup>

In the past decade, the increased use of nationwide injunctions has garnered significant media attention in the context of lawsuits directly seeking injunctive

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<sup>1</sup> OFF. OF ATT’Y GEN., LITIGATION GUIDELINES FOR CASES PRESENTING THE POSSIBILITY OF NATIONWIDE INJUNCTIONS I (2018).

<sup>2</sup> *Id.*; see Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1988 (2019) (citing Howard M. Wasserman, “Nationwide Injunctions Are Really ‘Universal’ Injunctions and They Are Never Appropriate,” 22 LEWIS & CLARK L. REV. 335, 338, 349–53 (2018)).

<sup>3</sup> See Nicholas Bagley & Samuel Bray, *Judges Shouldn’t Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471/>.

<sup>4</sup> Compare *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (“[T]he party bringing suit must show that the action injures him in a concrete and personal way. . . . This requirement is not just an empty formality.”)), with *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1149 (D. Haw. 2017) (“The State alleges standing based upon injuries to its proprietary and quasi-sovereign interests. . . . Plaintiffs allege that EO–3 will hinder the University from recruiting and retaining a world-class faculty and student body.”), and *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (“[T]he States allege that the teaching and research missions of their universities are harmed by the Executive Order’s effect on their faculty and students who are nationals of the seven affected countries.”).

<sup>5</sup> See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015); *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*4 (W.D. Wash. Feb. 3, 2017); *Hawaii*, 265 F. Supp. 3d at 1145; *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936–37 (N.D. Ill. 2017); Casey Tolan, *California Has Now Sued the Trump Administration 50 Times—and Racked Up Plenty of Victories*, MERCURY NEWS (May 14, 2019, 1:13 PM), <https://www.mercurynews.com/2019/05/14/california-lawsuits-trump-administration-xavier-becerra-50-times/>; see also Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421 (2017) (arguing that “[i]n equity . . . injunctions did not control the defendant’s behavior against nonparties”).

relief brought by state attorneys general against the federal government.<sup>6</sup> These individual state actors are filing suit by asserting the rights of their citizens generally or claiming attenuated forms of direct injuries.<sup>7</sup> This form of litigation against the federal government has increased following “the Supreme Court’s decision in *Massachusetts v. EPA*, which relaxed the standing requirements for states” by holding that Massachusetts had “special solicitude” to sue in its quasi-sovereign capacity.<sup>8</sup> Established standing limitations require a plaintiff to show a concrete and particularized injury that is “actual or imminent,” rather than a hypothetical or intangible harm.<sup>9</sup> Once standing has been met, courts have traditionally exercised equitable power by tailoring a specific ruling to the parties of the case, rather than the nation as a whole.<sup>10</sup>

Current nationwide injunctions initiated by state actors usually begin with an individual state attorney general seeking out a favorable district court.<sup>11</sup> The lawsuit then asserts standing to sue based on the theory that their state, or third parties that may be associated with their state, will experience an injury if the executive policy is enforced.<sup>12</sup> The individual district judge, whose court was sought out specifically for a favorable ruling,<sup>13</sup> then issues a preliminary nationwide injunction that halts the executive policy as it applies to the nearly 330 million people living in the United States.<sup>14</sup>

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<sup>6</sup> See Tolan, *supra* note 5.

<sup>7</sup> See *Hawaii*, 265 F. Supp. 3d at 1149; *Washington*, 847 F.3d at 1159.

<sup>8</sup> Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1955, 1957 (2019); see also *Massachusetts*, 549 U.S. at 520 (stating that Massachusetts was entitled to special solicitude in the Court’s standing analysis to protect its quasi-sovereign interests).

<sup>9</sup> See *Texas*, 809 F.3d at 150 (stating that “the states have the burden of establishing standing . . . [and] must show an injury that is ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling’” (internal citation omitted)); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that the plaintiff must allege a “personal stake in the outcome of the controversy as to assure that concrete adverseness”); *Lujan*, 504 U.S. at 581; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“[A] plaintiff must demonstrate standing for each claim he seeks to press.”).

<sup>10</sup> See generally *Bray*, *supra* note 5 (noting the increase in applying injunctions to non-parties over the past decade to thwart executive policy).

<sup>11</sup> Tolan, *supra* note 5 (citing Becerra’s response on why he filed suit in the Northern District [Bay Area] instead of the Eastern District of California [Sacramento], where his office was located).

<sup>12</sup> See *Washington*, 847 F.3d at 1160 (finding that the states had standing to sue under the “third party standing” doctrine in which the states could “assert the rights of . . . students, scholars, and faculty” of state universities affected by the Executive Order).

<sup>13</sup> See Bagley & Bray, *supra* note 3 (“[N]ational injunctions encourage forum shopping . . . [b]ecause a litigant only has to win in a single court to stop the implementation of a congressional statute or agency rule . . . [and] [i]t’s no coincidence that . . . many of the high-profile challenges to Trump policies have been brought in deep-blue states.”).

<sup>14</sup> See *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited June 9, 2021).

The increased use of nationwide injunctions sought by states positions the judicial branch at a crossroad between its ability to carry out its essential function of judicial review<sup>15</sup> and becoming a political tool in itself. In 1788, James Madison wrote, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>16</sup> To protect the other two branches from judicial overreach, Article III of the Constitution limits federal courts’ jurisdiction to only “cases” and “controversies.”<sup>17</sup> This limitation is a jurisdictional and remedial command that requires a plaintiff to show that they have “standing” to file suit.<sup>18</sup> Even in the context of state actors, standing “is not just an empty formality” but requires a showing of a concrete and personalized injury to that plaintiff.<sup>19</sup> Standing is an important doctrine in the context of the modern-day judicial branch, which has seen an increase in public law litigation.<sup>20</sup>

In addition to the undesirability of nationwide injunctions based on standing and equitable grounds, the issuance of nationwide injunctions presents procedural issues that pose a threat to effective judicial review of important legal issues.<sup>21</sup> If a singular district court is able to issue a definitive ruling against the government, the development of law in regard to that issue is frozen by “the first final decision rendered” and the Supreme Court is “deprived of the benefit it receives from permitting several courts of appeals to explore a difficult question.”<sup>22</sup>

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<sup>15</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>16</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>17</sup> U.S. CONST. art. III, § 2. (“The judicial power shall extend to all cases . . . [and] controversies,” in law and equity that arise “under” the Constitution).

<sup>18</sup> See *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

<sup>19</sup> *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (“[T]he party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality.” (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring))).

<sup>20</sup> See Nash, *supra* note 2, at 1990–91 (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288–1304 (1976)).

<sup>21</sup> OFF. OF ATT’Y GEN., *supra* note 1, at 4.

<sup>22</sup> *Id.* (“[A]llowing only one final adjudication . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue” and would “deprive [the Supreme] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before . . . [the] Court grants certiorari.” (quoting *United States v. Mendoza*, 464 U.S. 154, 160 (1984))).

One has to ask: Why is the judicial system currently experiencing nationwide injunctions if they are based on attenuated forms of standing,<sup>23</sup> expand the court's equitable power, and pose a threat to the development of law?<sup>24</sup> The answer is layered and political, but it is relevant to note that the use of these nationwide injunctions has "accelerated dramatically" due to claims of executive overreach in both the Obama and Trump Administrations.<sup>25</sup> In a period of 8 years, Texas sued the Obama Administration 48 times, and California upped the ante by suing the Trump Administration 110 times over a period of just 4 years.<sup>26</sup> By all appearances, the increased use of these nationwide injunctions seems to have become a political tool for state actors to utilize the federal court system to block executive policy.<sup>27</sup> In less than a decade, the rate of individual state actors suing the federal government to implement nationwide injunctions has quadrupled.<sup>28</sup> This accelerating practice operates as an "equal opportunity offender" that can leave a bitter taste in the mouths of both Republicans and Democrats when the time comes for a district judge, potentially in a circuit on the opposite side of the country, to enjoin a law or policy that they support.<sup>29</sup> Using nationwide injunctions as a political tool can have the adverse consequence of allowing an individual state to "freeze" up enforcement of executive policies in regions of the country that may enjoy overwhelming support for such policies.<sup>30</sup> This danger is especially prevalent in an era of increasing political polarization among the various states and geographic areas of the country.<sup>31</sup> Although states have asserted standing to bring these lawsuits

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<sup>23</sup> Courts are currently allowing lawsuits to proceed based on hypothetical injuries to the state's quasi-sovereign interests. *See Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1149 (D. Haw. 2017); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

<sup>24</sup> *See Mendoza*, 464 U.S. at 160.

<sup>25</sup> *Bagley & Bray*, *supra* note 3.

<sup>26</sup> Byrhonda Lyons, *California's Bill for Fighting Trump in Court? \$41 Million So Far*, CAL MATTERS (Jan. 22, 2021), <https://calmatters.org/justice/2021/01/california-cost-trump-lawsuits/>.

<sup>27</sup> *Bray*, *supra* note 5, at 418–19; *see Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015); *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*4 (W.D. Wash. Feb. 3, 2017); *Hawaii*, 265 F. Supp. 3d at 1145; *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936–37 (N.D. Ill. 2017); *Tolan*, *supra* note 5.

<sup>28</sup> *Tolan*, *supra* note 5 (noting that California sued the Trump Administration fifty times in less than two and a half years, while Texas sued the Obama Administration forty-eight times in total over a period of eight years); Lyons, *supra* note 26 (noting that by the end of the Trump Administration's four years in office, California had sued the Administration 110 times, costing the state \$41 million and counting).

<sup>29</sup> *Bagley & Bray*, *supra* note 3.

<sup>30</sup> *See Getzel Berger*, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1087 (2017) (noting that once a "policy is enjoined nationwide" the government "cannot enforce it, the regulated parties do not sue, and courts never hear the issue again . . . . The law is frozen against the government[.]"); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

<sup>31</sup> *The Big Sort—Political Segregation*, ECONOMIST (June 19, 2008), <https://www.economist.com/usa/2008/06/19/the-big-sort> (claiming that "Americans are increasingly forming like-minded

based on their individual state's sovereignty,<sup>32</sup> the practice ultimately infringes upon the rights of other states when it is not limited geographically.

In approaching the issue of expansive state standing in the context of nationwide injunctions, this Comment identifies the root causes leading to their increased use and sets out a bright-line solution of a geographic statewide limitation when state actors bring suit against a federal law or policy. Under a statewide limitation, an injunction brought by a state actor may only apply to the geographic state in which the enjoining district judge is located. This limitation would have a secondary effect in preventing a group of states from joining in an action to claim "party" status.<sup>33</sup> If a state attorney general wishes to enjoin a federal policy as it applies to their state,<sup>34</sup> they would be forced to litigate the matter in their own backyard. If a statewide injunction would be impractical to have any net effect on an executive policy, the limited injunction would still carry the force of a declaratory judgement that was historically sufficient. These limitations should be enacted by federal legislation because Congress has the power to create and define the jurisdiction of "inferior" federal courts under Article III, Section 1.<sup>35</sup> Furthermore, the Supreme Court should address standing requirements in the context of lawsuits brought under theories of a state's quasi-sovereign interests, or the rights of its citizens generally.<sup>36</sup> An injunction should only apply to direct and identifiable harms experienced by the parties bringing suit, as opposed to a broad and unidentifiable class of persons. Although addressing the issue of standing and geographically limiting injunctions in the context of state actors bringing suit is not a complete solution to address concerns over the abuse of the judicial power by lower courts,<sup>37</sup> such a limitation would restrict politically motivated state actors from promoting the abuse of the

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clusters . . . . Conservatives are choosing to live near other conservatives, and liberals near liberals[.]").

<sup>32</sup> See *Texas*, 809 F.3d at 146, 151; *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017); *Hawaii*, 265 F. Supp. 3d at 1149; see also THE FEDERALIST NO. 45, at 239 (James Madison) (George W. Carey & James McClellan eds., 2001) (stating that "the States will retain, under the proposed constitution, a very extensive portion of active sovereignty").

<sup>33</sup> See Mank & Solimine, *supra* note 8, at 1957 (citing RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 279 (7th ed. 2015)); see also *Texas*, 809 F.3d at 146 ("Twenty-six states . . . challenged DAPA under the Administrative Procedure Act[.]").

<sup>34</sup> See Nash, *supra* note 2, at 1992 (citing the political motivations of state attorneys general to litigate against executive policies "with which she and her constituents disagree").

<sup>35</sup> U.S. CONST. art. III, § 1.

<sup>36</sup> See *infra* Part III.B.

<sup>37</sup> Theoretically, a private actor could bring suit seeking a nationwide injunction if they were able to assert a direct and verifiable harm to meet traditional standing requirements. However, the vast majority of cases garnering significant media attention have been initiated by state actors. See *Texas*, 809 F.3d at 146; *Washington*, 847 F.3d at 1160; *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

judicial power to impose their political views on all states and territories—not just their own.

To support this proposition, Part I first highlights recent applications of nationwide injunctions against both the Obama and Trump Administrations. Part II subsequently looks to the origin of nationwide injunctions, as well as potential constitutional arguments over the scope of the courts' equitable power. Part III addresses the expansion of state standing in the context of nationwide injunctions and why this is detrimental to our judicial system. Part IV looks to how the dangers of broad injunctions outweigh any perceived benefits, as well as the political factors leading to their use. Lastly, Part V sets out a concrete solution to limit an injunction geographically to a statewide effect if the suit is brought by a state actor against a federal law or policy, and advocates for the Supreme Court to address the breadth of various standing doctrines.

## I. RECENT APPLICATIONS OF NATIONWIDE INJUNCTIONS

Under the Obama and Trump Administrations, two executive policies were hampered by the implementation of nationwide injunctions in high-profile cases.<sup>38</sup> The first instance is President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA),<sup>39</sup> and the second instance is President Trump's string of executive orders temporarily halting immigration from predominantly Muslim countries, commonly referred to as the "travel ban."<sup>40</sup> This Part first discusses the examples of nationwide injunctions against both the Obama and Trump Administrations before turning to the Supreme Court and executive branch's response to this practice.

### A. *Nationwide Injunction Against the Obama Administration*

This Comment first turns to a nationwide injunction, as applied against the Obama Administration, that occurred in 2015 when Texas spearheaded a large coalition of states seeking to strike down DAPA.<sup>41</sup> Under DAPA, "[o]f the approximately 11.3 million illegal aliens in the United States, 4.3 million would be eligible for lawful presence."<sup>42</sup> The status of "lawful presence" would allow

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<sup>38</sup> See *Texas*, 809 F.3d at 150; see Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); see Richard Wolf, *Travel Ban Timeline: 17 Months, Three Versions, Two Appeals Courts, One Supreme Court*, USA TODAY (Apr. 25, 2018, 11:44 AM), <https://www.usatoday.com/story/news/politics/2018/04/25/trump-travel-ban-timeline-supreme-court/547530002/>.

<sup>39</sup> *Texas*, 809 F.3d at 146.

<sup>40</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

<sup>41</sup> *Texas*, 809 F.3d at 146.

<sup>42</sup> *Id.* at 148.

previously ineligible aliens to receive government benefits, social security, and health insurance under Part A of the Medicare program.<sup>43</sup> Over half of U.S. states—twenty-six in total—joined as parties to the litigation against DAPA.<sup>44</sup> The states put forward three separate grounds to enjoin DAPA.<sup>45</sup> “First, they asserted that DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking.”<sup>46</sup> Alternatively, the states claimed that the Department of Homeland Security (DHS) “lacked the authority to implement the program even if it followed the correct rulemaking process, such that DAPA was substantively unlawful under the APA.”<sup>47</sup> Lastly, the states asserted “that DAPA was an abrogation of the President’s constitutional duty to ‘take Care that the Laws be faithfully executed.’”<sup>48</sup>

The district court held that only Texas had standing based on the fact that it would suffer a “financial injury by having to issue driver’s licenses to DAPA beneficiaries at a loss.”<sup>49</sup> The court also stated that Texas would have standing under an alternative theory that they referred to as “abdication standing,” based on the fact that the United States had “exclusive authority over immigration but has refused to act in that area.”<sup>50</sup> Once the court determined that standing was met, Texas was successful on the merits of its argument.<sup>51</sup> Because DAPA was not a procedural rule, it required notice and comment under the APA.<sup>52</sup> The court stated that “conferring lawful presence on 500,000 illegal aliens residing in Texas” would force the state to spend “millions of dollars.”<sup>53</sup> Such modification of substantive rights was only nominally procedural, and “the exemption for such rules of agency procedure” could not apply.<sup>54</sup> The circuit court rejected a limited statewide injunction for Texas in disregarding DAPA, and instead held that “a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.”<sup>55</sup> The ruling in *Texas v. United States* effectively halted the implementation of DAPA and prevented any

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 146.

<sup>45</sup> *Id.* at 149.

<sup>46</sup> *Id.* (claiming that DAPA violated the APA).

<sup>47</sup> *Id.* at 149; *see also* 5 U.S.C. § 706(2)(A)–(C) (stating that courts may hold unlawful and set aside agency action).

<sup>48</sup> *Texas*, 809 F.3d at 149.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 149–50 (citing *Texas v. United States*, 86 F. Supp. 3d 591, 636–43 (S.D. Tex. 2015)).

<sup>51</sup> *Id.* at 176.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (citing *U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984)).

<sup>55</sup> *Id.* at 188.

other state from recognizing lawful presence of potentially DAPA eligible aliens.<sup>56</sup> The Supreme Court affirmed this ruling and did not address the issue of whether a nationwide injunction was permissible.<sup>57</sup>

### *B. Nationwide Injunctions Against the Trump Administration*

The second example of a nationwide injunction is a string of recent cases against President Trump's "travel ban" titled "Protecting the Nation from Foreign Terrorist Entry into the United States."<sup>58</sup> President Trump's executive order affected predominantly Muslim countries for the stated purpose of preventing future terrorist attacks against the American people.<sup>59</sup> The executive order suspended visas and denied entry into the United States of individuals from seven countries<sup>60</sup> for a period of ninety days so "[t]he Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigations" could implement a program to "identify individuals seeking to enter the United States on a fraudulent basis with intent to cause harm."<sup>61</sup> The States of Washington and Minnesota quickly brought suit to enjoin President Trump's executive order.<sup>62</sup>

In *Washington v. Trump*, the district court ruled that the states met the burden necessary to implement a nationwide injunction because "they have shown that they are likely to succeed on the merits" and "established a likelihood of irreparable injury."<sup>63</sup> The court reasoned "that the circumstances brought before it . . . [were] such that it must intervene to fulfill its constitutional role in our

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<sup>56</sup> See *id.* at 187–88.

<sup>57</sup> *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

<sup>58</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); Wolf, *supra* note 38; *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*3–4 (W.D. Wash. Feb. 3, 2017); *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017); *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1230 (D. Haw. 2017).

<sup>59</sup> See Exec. Order No. 13,769, 82 Fed. Reg. 8,977, 8,977 (Jan. 27, 2017) (asserting the need for enhanced screening of entrants into the United States based on the fact that "when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans"); see also Abigail Hauslohner, *During First Two Years of 'Muslim Ban,' Trump Administration Granted Few Waivers*, WASH. POST (Sept. 24, 2019, 6:21 PM), [https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0_story.html) ("Rep. Andy Biggs (R-Ariz.) pointed out that the countries Trump targeted derived from a list of nations the Obama administration had chosen for added scrutiny after the 2015 terrorist attacks in Paris.").

<sup>60</sup> See Exec. Order No. 13,769, 82 Fed. Reg. 8,977, § 4 (Jan. 27, 2017).

<sup>61</sup> See *id.*

<sup>62</sup> See *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*3 (W.D. Wash. Feb. 3, 2017).

<sup>63</sup> See *id.* at \*6.

tripart government.”<sup>64</sup> Less than a week later, the Ninth Circuit denied the United States’ emergency motion for a stay of the injunction pending appeal.<sup>65</sup> The court held that the states had standing to sue under a theory that “the teaching and research missions of their [state] universities” were harmed, and alternatively under the “third party standing” doctrine in which the states could “assert the rights of . . . students, scholars, and faculty” of state universities affected by the executive order.<sup>66</sup> Ultimately, the Trump Administration was forced to revise its “travel ban” to target only six countries and revised the ban for the second time after it was struck down in *Hawaii v. Trump*.<sup>67</sup> The travel ban’s third iteration was finally upheld by the Supreme Court, which reversed the Ninth Circuit’s ruling.<sup>68</sup> The Supreme Court ruled that President Trump’s Proclamation fell well within the “comprehensive delegation” under the Immigration and Nationality Act (INA)<sup>69</sup> and was a lawful exercise of discretion.<sup>70</sup>

Even though the Ninth Circuit’s ruling was overturned, the Court—for the second time in two years—avoided the specific question of whether a nationwide injunction was permissible.<sup>71</sup> The Court stated, “[o]ur disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.”<sup>72</sup> However, Justice Thomas wrote a concurrence urging the Court to go further:

The District Court imposed an injunction that barred the Government from enforcing the President’s Proclamation against anyone, not just the plaintiffs. Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called “universal” or “nationwide” injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping

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<sup>64</sup> *Id.* at \*9.

<sup>65</sup> *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017).

<sup>66</sup> *Id.* 1159–60.

<sup>67</sup> *See Wolf*, *supra* note 38; *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1229–30 (D. Haw. 2017).

<sup>68</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018); *see Proclamation No. 9,645*, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

<sup>69</sup> *Trump*, 138 S. Ct. at 2408 (“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”); *see also* 8 U.S.C. § 1182(f).

<sup>70</sup> *Trump*, 138 S. Ct. at 2408.

<sup>71</sup> *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2272 (2016); *see Trump*, 138 S. Ct. at 2423.

<sup>72</sup> *Trump*, 138 S. Ct. at 2423.

relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.<sup>73</sup>

Justice Thomas's concurrence was the first overt pronouncement by a Supreme Court Justice condemning the current use of nationwide injunctions.<sup>74</sup> Justice Thomas noted that the current practice was encouraging forum shopping for sympathetic district courts and taking a heavy toll on the judicial branch.<sup>75</sup>

### C. Continued Criticism by the Supreme Court

In 2020, Justice Gorsuch, joined by Justice Thomas, also addressed the practice of issuing nationwide injunctions in *Department of Homeland Security v. New York*.<sup>76</sup> There, the Court granted a stay from a nationwide injunction that halted DHS's new definition of the term "public charge."<sup>77</sup> "Public charge" means an individual that is likely to seek public benefits over a designated threshold.<sup>78</sup>

Under the Trump Administration, DHS issued a ruling that required aliens seeking an extension of stay or change in status to "demonstrate that they have not . . . [sought] to extend or change" their receipt of public benefits over an amount set by DHS.<sup>79</sup> In his concurrence, Justice Gorsuch noted that "a single judge in New York enjoined the government from applying the new definition to anyone, without regard to geography or participation in this or any other lawsuit."<sup>80</sup> Justice Gorsuch concluded his remarks by asking, "[w]hat in this gamesmanship and chaos can we be proud of?"<sup>81</sup> Although the Court was

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<sup>73</sup> *Id.* at 2424–25 (Thomas, J., concurring).

<sup>74</sup> *See id.*

<sup>75</sup> *Id.* at 2425.

<sup>76</sup> *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring).

<sup>77</sup> *Id.* at 599.

<sup>78</sup> Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

<sup>79</sup> *Id.*

<sup>80</sup> *Dep't of Homeland Sec. v. New York*, 140 S. Ct. at 599 (Gorsuch, J., concurring).

<sup>81</sup> *Id.* at 601.

hearing the case due to a nationwide injunction implemented in the Southern District of New York, the Northern District of California and the District of Maryland had both issued universal injunctions against the rule,<sup>82</sup> and “the Eastern District of Washington had entered a similar order, but went much farther geographically, enjoining the government from enforcing its rule globally.”<sup>83</sup> Furthermore, the Northern District of Illinois fashioned “its own injunction” that was “limited to enforcement within the State of Illinois.”<sup>84</sup>

Through the Supreme Court’s ruling, all of the above-mentioned injunctions were null and void with one exception: Illinois.<sup>85</sup> When the smoke cleared, only Illinois’s statewide injunction was left standing, at least for the time being.<sup>86</sup> Justice Gorsuch’s concurring opinion, joined by Justice Thomas, marks the second time in two years that the Court has set aside a nationwide injunction and issued condemning remarks, yet fell short of addressing the looming issue.<sup>87</sup>

#### *D. Executive Response to Nationwide Injunctions*

The Department of Justice under both the Obama and Trump Administrations argued “that ‘equitable relief must be tailored to the particular final agency action and parties before the court’ and ‘should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,’” which is consistent with Justice Gorsuch and Justice Thomas’s respective concurrences.<sup>88</sup> Both political parties taking the same position on this issue when they are in office seems to bolster the proposition that nationwide injunctions brought by state actors are increasingly becoming political tools.<sup>89</sup>

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<sup>82</sup> *Id.* at 599.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 600.

<sup>86</sup> *See id.*; U.S. CITIZENSHIP & IMMIGR. SERVS., *Public Charge Inadmissibility Determinations in Illinois*, <https://www.uscis.gov/green-card/public-charge-inadmissibility-determinations-illinois> (last updated Feb. 24, 2020).

<sup>87</sup> *See* Dep’t of Homeland Sec. v. New York, 140 S. Ct. at 600–01 (Gorsuch, J., concurring); *see* Trump v. Hawaii, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring).

<sup>88</sup> *See* OFF. OF ATT’Y GEN., *supra* note 1; *see also* Trump, 138 S. Ct. at 2424–25 (Thomas, J., concurring) (arguing that universal injunctions are “beginning to take a toll on the federal court system” and that “they appear to be inconsistent with longstanding limits on equitable relief”); Dep’t of Homeland Sec. v. New York, 140 S. Ct. at 600 (Gorsuch, J., concurring) (“The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them.”).

<sup>89</sup> Trump, 138 S. Ct. at 2424–25 (Thomas, J., concurring); *see* OFF. OF ATT’Y GEN., *supra* note 1 (noting that the Bush, Obama, and Trump Administrations have “consistently . . . argued against granting relief outside of the parties to a case”); *see also* Katie Benner, *Nationwide Injunctions Speak to Judiciary’s Growing Power*, Barr Says, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/us/politics/barr-nationwide-injunctions.html> (arguing that “injunctions allow federal judges to overreach beyond their geographically

Although the concurrences speak to the lower court's equitable authority over nationwide injunctions, perhaps the more alarming issue is the expansion of state standing in the context of nationwide injunctions.<sup>90</sup> Permitting this expansion of state standing past the grounds articulated in *Massachusetts v. EPA* would effectively allow a state to unilaterally halt executive policy based on intangible injuries of unidentified persons rather than a direct injury to the state itself.<sup>91</sup> This represents a dangerous proposition that would essentially do away with Article III limitations on standing requiring a "concrete injury" when a state is filing suit.<sup>92</sup>

## II. ORIGIN OF NATIONWIDE INJUNCTIONS AND EQUITABLE ISSUES PRESENTED

The dramatic increase in the use of national injunctions has sparked debate from legal historians over their constitutionality and origin.<sup>93</sup> Some historians argue that the nonexistence of "nationwide" injunctions applying to non-parties is merely "the result of a historical accident" rather than "any inherent limitations on the remedies available in equity."<sup>94</sup> These historians claim that "[e]quity courts in 1789 could 'adapt their decrees to all the varieties of circumstances . . . and adjust them to all the peculiar rights of all the parties in interest' . . . to do complete justice."<sup>95</sup> They also note that "[i]n the late 1800s and early 1900s, federal courts sitting in equity issued labor injunctions" applying to thousands of workers, and "very few federal laws were held unconstitutional in the [eighteenth] and [nineteenth] centuries."<sup>96</sup> The opposition argues that nationwide injunctions cannot be traced to any traditional form of

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prescribed domains and . . . undermine the idea that the judiciary is the impartial arbiter of American democracy" and that nationwide injunctions have "politicized the judicial branch").

<sup>90</sup> *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017).

<sup>91</sup> *Compare Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way." (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring))), with *Washington*, 847 F.3d at 1160 (claiming that state universities could assert standing based on third parties' alleged injuries).

<sup>92</sup> *Nash*, *supra* note 2, at 2005–06 ("It is generally accepted that the tripartite constitutional standing inquiry will most often turn on the injury prong. The court has made clear that only an injury that is 'concrete and particularized,' and 'either actual or imminent' will suffice.").

<sup>93</sup> See Christopher J. Walker, *Legal Historians Weigh In on the Nationwide Injunction Debate*, YALE J. REGUL. (Nov. 20, 2018), <http://yalejreg.com/nc/legal-historians-weigh-in-on-the-nationwide-injunction-debate/>.

<sup>94</sup> See *id.* (discussing the argument of an "amicus brief filed by legal historians Amalia Kessler, Robert Gordon, Bernadette Meyler, Gregory Ablavsky, Stanley Katz, Hendrik Hartog, and Kellen Funk" in a Seventh Circuit sanctuary city case).

<sup>95</sup> See *id.* (citing JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 28 (2d ed. 1839) (1836)).

<sup>96</sup> See *id.*

equity,<sup>97</sup> and “equitable principles leave no room for nationwide injunctions.”<sup>98</sup> The following section details the origins of nationwide injunctions, the rise in their usage, and the constitutionality of extending such injunctions to non-parties.

### A. *Origin of the Nationwide Injunction*

Although an injunction in traditional English courts of equity was not permitted “against the Crown,” equitable courts retained the power to “resolve a number of claims at once” to avoid a “multiplicity of suits.”<sup>99</sup> A “bill of peace” would be issued by these courts, which allowed a Chancellor to “consolidate a number of suits . . . between two parties.”<sup>100</sup> This consolidation of cases by a Chancellor was permissible to avoid “repeated instances of litigation.”<sup>101</sup> The idea of a class action lawsuit for direct injuries to a group of similarly situated individuals finds support in the consolidation of cases under a bill of peace.<sup>102</sup> However, an early English Chancellor hearing a handful of similar cases under one device is not analogous to a nationwide injunction halting an executive order over millions of people.<sup>103</sup> Proponents of nationwide injunctions are overextending a sensible justification when they assert the position that because a “bill of peace” could control a “defendant’s conduct vis-à-vis nonparties,” courts in turn have equitable authority to issue present-day nationwide injunctions against the federal government.<sup>104</sup> Rather, the limited history of nationwide injunctions in U.S. case law demonstrates that while courts have some power to enjoin non-parties in an injunction, such power does not necessarily extend to the entire country.

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<sup>97</sup> Bray, *supra* note 5, at 425.

<sup>98</sup> See Walker, *supra* note 93 (noting Samuel Bray’s counterargument citing the rejection of nationwide injunctions in *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

<sup>99</sup> Bray, *supra* note 5, at 425.

<sup>100</sup> *Id.* at 426 (citing JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 245–46, at 464–68 (Spencer W. Symons ed., 5th ed. 1941)).

<sup>101</sup> *Id.* at 425–26.

<sup>102</sup> See FED. R. CIV. P. 23; *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979) (noting that class action lawsuits under Rule 23 of the Federal Rules of Civil Procedure are “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only”); Bray *supra* note 5, at 426; see also FED. R. CIV. P. 23(a)(2–3) (requiring “questions of law or fact common to the class” and “claims or defenses of the representative parties are typical of the claims or defenses of the class”).

<sup>103</sup> See U.S. CENSUS BUREAU, *supra* note 14.

<sup>104</sup> Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1080–81 (2018).

### 1. *Early Cases of Semi-Broad Injunctions*

The modern conception of nationwide injunctions is markedly absent from our nation's judicial history until the 1960s.<sup>105</sup> In the early twentieth century, federal courts consistently granted injunctions that only prohibited enforcement of a law against individual plaintiffs.<sup>106</sup> There remains a select few cases that seem to be outliers against this general and accepted practice in the context of injunctions against federal laws.<sup>107</sup> One such case, occurring in 1918, is *Hammer v. Dagenhart*, where the court affirmed an injunction that extended to the entire Western District of North Carolina.<sup>108</sup> In *Hammer*, the Court held that Congress invaded the states' reserved powers under the Tenth Amendment when it sought to prohibit the transportation of goods that were manufactured using child labor, and to "sustain (the) statute . . . would sanction an invasion by the federal power of the control of a matter purely local in its character,"<sup>109</sup> Although the injunction applied to non-parties, it was limited to the geographic district in which the court presided.<sup>110</sup> The plaintiff in *Hammer* did not attempt to seek an injunction applying anywhere outside of the State of North Carolina, let alone the country as a whole, nor did the court entertain such a possibility.<sup>111</sup>

An article written by Professor Mila Sohoni advocates for a contrary proposition by claiming that for over a century, "lower federal courts have been issuing injunctions that reach beyond the plaintiffs."<sup>112</sup> Sohoni notes that in 1913, the Supreme Court issued a preliminary injunction "in the months preceding its opinion in *Lewis Publishing Co. v. Morgan*" after the district court dismissed the case for want of equity.<sup>113</sup> *Lewis Publishing Co.* challenged the

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<sup>105</sup> Bray, *supra* note 5, at 428 (claiming that "no national injunctions against federal defendants [were implemented] for the first century and a half of the United States," and they were "rejected as unthinkable as late as *Frothingham v. Mellon*, and to have been conspicuously absent as late as *Youngstown Sheet & Tube Co. v. Sawyer*").

<sup>106</sup> See Bray, *supra* note 5, at 436; *Adkins v. Children's Hosp.*, 261 U.S. 525, 539, 545, 546, 562 (1923) (holding an act providing fixed minimum wages for female employees was unconstitutional because "[a]n interference (with the liberty to contract) . . . must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State," but only granting relief to the parties of the case); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 405, 433 (1935) (granting a plaintiff-protective injunction against unconstitutional orders and regulations against oil producers); *Hammer v. Dagenhart*, 247 U.S. 251, 268, 277 (1918).

<sup>107</sup> See *Hammer*, 247 U.S. at 277.

<sup>108</sup> See *id.* at 268, 277.

<sup>109</sup> *Id.* at 251, 276–77.

<sup>110</sup> Bray, *supra* note 5, at 436.

<sup>111</sup> *Id.* (noting that the plaintiff "did not seek, and the court did not award, a national injunction").

<sup>112</sup> Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 921 (2020) (rebutting "the proposition that the universal injunction is a recent invention").

<sup>113</sup> See *id.* at 924–25 (first citing *J. of Com. & Com. Bull. v. Burlleson*, 229 U.S. 600, 600 (1913) (per

Post Office Appropriation Act of 1912, contending that the act deprived the publishers of the privileges of the mail if they did not provide the required information for second class mail privileges under the act.<sup>114</sup> The preliminary injunction was granted only for “other newspaper publishers,” and not just the specific plaintiff who brought the case.<sup>115</sup> Although the injunction applied to non-parties, it was not a “nationwide injunction” in the modern sense, and the lawsuit was ultimately unsuccessful.<sup>116</sup> Even so, the Court did employ a temporary form of an injunction that applied to newspaper publishers generally.<sup>117</sup>

In the context of broad injunctions against state law, *Pierce v. Society of Sisters* “affirmed a universal injunction” and “remains good law” as landmark precedent almost a century later.<sup>118</sup> In *Pierce*, a group of private primary schools challenged the constitutionality of an Oregon law requiring all children from the ages of eight to sixteen to attend public schools.<sup>119</sup> The Court ruled that Oregon’s compulsory public education law violated the Fourteenth Amendment<sup>120</sup> and “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>121</sup> In making this determination, the Court upheld the preliminary injunction against the enforcement of the state law’s application to all private or religious schools in Oregon and stated that “[p]revention of impending injury by unlawful action is a well-recognized function of courts of equity.”<sup>122</sup> The lower court did not simply afford relief from the compulsory education law by issuing a preliminary injunction as it applied to the individual private schools that brought the case (“plaintiff-protective injunction”), but it also upheld the preliminary injunction against enforcement of the Oregon law against anyone in the state.<sup>123</sup> This affirmance of an injunction against a state law, applying on a statewide level, including non-parties, has been commonly upheld by the Supreme Court.<sup>124</sup>

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curiam); then citing *Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 296 (1913)).

<sup>114</sup> *Lewis Pub. Co.*, 229 U.S. at 296–97.

<sup>115</sup> See Sohoni, *supra* note 112, at 924–25.

<sup>116</sup> See *Lewis Pub. Co.*, 229 U.S. at 311.

<sup>117</sup> See Sohoni, *supra* note 112, at 924–25.

<sup>118</sup> *Id.* at 925 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925)).

<sup>119</sup> See *Pierce*, 268 U.S. at 530.

<sup>120</sup> U.S. CONST. amend. XIV.

<sup>121</sup> See *Pierce*, 268 U.S. at 534–35 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), to support the Court’s determination “that the Act of 1922” abridged the liberty of parents and guardians in directing the “upbringing and education” of their children, and stating that “[t]he child is not the mere creature of the State”).

<sup>122</sup> *Id.* at 536.

<sup>123</sup> See *id.* at 531–33.

<sup>124</sup> See *id.* at 529–30, 536 (affirming preliminary restraining order against the enforcement in the state of Oregon of the Compulsory Education Act); Sohoni, *supra* note 112, at 926 (claiming that “the Court affirmed

As the executive branch expanded in the mid-twentieth century,<sup>125</sup> cases asserted against the federal government invoked similar arguments regarding the scope of presidential powers that are currently being asserted.<sup>126</sup> Comparatively, the 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer* presents perhaps one of the strongest examples of executive overreach in our nation's history when juxtaposing the actions of President Truman with claims asserted against President Trump.<sup>127</sup> In *Youngstown*, President Truman issued an executive order against certain steel companies directing the Secretary of Commerce to take possession of most of the nation's steel mills.<sup>128</sup> There was "no statute that expressly authorize[d] the President to take possession of property," but rather an idea that the President held cumulative powers to take possession of private industry as "Commander in Chief of the Army and Navy" during the Korean War.<sup>129</sup> The mill owners sought a protective injunction and sought to challenge

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an injunction that reached beyond the plaintiffs' children and beyond the alleged plaintiff class" in the context of a state law); Frost, *supra* note 104, at 1081 ("[T]he historical practice supports the conclusion that courts have always had the authority to issue equitable relief that encompasses nonparties.").

<sup>125</sup> See Jay Cost, *The Expanding Power of the Presidency*, HOOVER INST. (Oct. 2, 2012), <https://www.hoover.org/research/expanding-power-presidency> ("Enterprising chief executives innovate new pathways of power, are met with little resistance, and thus the innovations soon become norms . . . [m]ost presidents since [Theodore Roosevelt] have contributed to this process, regardless of party or ideology [with the exception of Warren G. Harding and Calvin Coolidge].").

<sup>126</sup> See Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 832–33 (2018) (noting that the executive power, and its corresponding success at the Supreme Court, expanded during the years of Franklin Roosevelt, "peaked during the Reagan administration and has declined steadily since then"). There are three situations regarding the exercise of presidential power that effects judicial deference to the president: First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," and second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers," and third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring). Compare *id.* at 588–89 ("The seizure could not stand because Congress had the exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution[.]"), with *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) ("Absent suspension of the writ [of habeas corpus] by Congress, a citizen detained as an enemy combatant is entitled to . . . [D]ue P[ro]cess[.]").

<sup>127</sup> Compare *Youngstown*, 343 U.S. at 582, 588–89 (striking down an executive order directing the Secretary of Commerce to take possession of most of the nation's steel mills), with *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936–38 (N.D. Ill. 2017) (claiming "Chicago's local policy . . . , which restricts local officials' participation in certain federal immigration efforts" required a nationwide injunction against "new conditions on an annual federal grant," which prohibited policies restricting local authorities from sharing information with the Immigration and Naturalization Service "regarding the citizenship status of an individual"), and *Trump v. Hawaii*, 138 S. Ct. 2392, 2408, 2419 (2018) (citing that "foreign nationals seeking admission have no constitutional right to entry" and the INA explicitly states, "[w]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation . . . suspend the entry of all aliens or any class of alien").

<sup>128</sup> *Youngstown*, 343 U.S. at 582.

<sup>129</sup> See *id.* at 585, 587.

the President's actions as "lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President."<sup>130</sup> The plaintiffs in *Youngstown* present a classic example of a broad, protective injunction that is specifically tailored to the parties of a particular case.<sup>131</sup>

The first successful case to contemplate the use of a nationwide injunction, in its contemporary sense, against a federal law did not arise until *Wirtz v. Baldor Electric Co.* in 1963.<sup>132</sup> In *Wirtz*, representatives of the electronics industry filed a complaint to "set aside the Secretary's minimum wage determination for the industry," pursuant to the Walsh-Healey Act, alleging that the Secretary of Labor violated the APA.<sup>133</sup> The case was appealed to the D.C. Circuit, who "found the Secretary's determination invalid" and "resolved the scope of the injunction, conditional on the district court finding standing."<sup>134</sup> The court claimed that the scope of the nationwide injunction was proper regardless of whether the suit was "maintainable as a class action," because "[p]arties aggrieved by administrative agency orders act as representatives of the public interest in seeking judicial review . . . [and] no artificial restrictions of the courts power to grant equitable relief in the furtherance of that interest can be acknowledged."<sup>135</sup> *Wirtz* seems to have been an anomaly for the time because the court did not cite any "prior cases [to offer] support."<sup>136</sup>

## 2. *Birth of the Modern Nationwide Injunction*

Subsequent cases in the late-1960s and early 1970s advanced the idea of a nationwide injunction with a truly "preliminary national injunction" being issued in *Harlem Valley Transportation Ass'n v. Stafford* in 1973.<sup>137</sup> These early cases represent somewhat of an intermediate position between more recent nationwide injunctions and previous plaintiff-based or statewide injunctions.<sup>138</sup>

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<sup>130</sup> *Id.* at 582.

<sup>131</sup> *See id.* at 582–83.

<sup>132</sup> *Bray*, *supra* note 5, at 438.

<sup>133</sup> *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 520–22 (D.C. Cir. 1963).

<sup>134</sup> *Bray*, *supra* note 5, at 437 (citing *Wirtz*, 337 F.2d at 520, 531–35).

<sup>135</sup> *Wirtz*, 337 F.2d at 533, 535. *Wirtz* cited dicta from *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, which denied both the Commission's motion to dismiss and the Association's request for a stay. *Id.* (citing *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 923 (1958)).

<sup>136</sup> *Bray*, *supra* note 5, at 438.

<sup>137</sup> *Id.* at 439–40 (citing *Flast v. Cohen*, 392 U.S. 83 (1968); *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057, 1059 (S.D.N.Y. 1973)).

<sup>138</sup> *Compare Youngstown*, 343 U.S. at 582–83 (noting that the parties sought a plaintiff-protective injunction), with *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) ("It is not beyond the power of a court . . . to issue a nationwide injunction."), and *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (reversing "the grant of the preliminary [nationwide] injunction as an abuse of discretion," which

The initial use of a “preliminary” nationwide injunction was a temporary measure conditioned on class certification, rather than an outright nationwide injunction without such certification.<sup>139</sup>

In *Harlem Valley*, a group of plaintiffs brought suit against the Interstate Commerce Commission (ICC), its Chairman, and the Administrator of the Environmental Protection Agency.<sup>140</sup> The plaintiffs sought “declaratory and injunctive relief against alleged violations of the National Environmental Policy Act of 1969 . . . in the procedures attendant upon abandonments of rail lines under the jurisdiction of the ICC.”<sup>141</sup> The plaintiffs intended “to maintain the proceeding as a class action under Fed. R. Civ. P. 23(b)(2),” alleging that they were a representative class.<sup>142</sup> The court issued a temporary nationwide injunction, pending class certification; Judge Frankel was ambivalent on the issue after “[b]oth the United States and the ICC” not only conceded, but insisted “that a preliminary injunction in . . . [the] case would ‘affect the agency in the entire scope of its authority and jurisdiction.’”<sup>143</sup> *Harlem Valley* provides a unique issue, one in which the government has conceded the scope of the issue and agreed with the plaintiffs on the merits.<sup>144</sup> A preliminary injunction was not needed when the government conceded the issue; “the court should [have] instead—granted a declaratory judgment.”<sup>145</sup>

Following this line of cases, the idea of a nationwide injunction in the context of non-class action lawsuits were not directly or principally sought after by plaintiffs as the desired remedy.<sup>146</sup> Cases invoking the use of a nationwide injunction were mainly “isolated occurrences.”<sup>147</sup> The first consistent examples of a party directly seeking a “nationwide injunction,” as opposed to simply being awarded one, arose during George W. Bush’s presidency.<sup>148</sup> During the Bush Administration, “federal district courts in California took the lead, enjoining various environmental policies.”<sup>149</sup> Nationwide injunctions throughout the

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was granted by the districts courts of Maryland and Hawaii).

<sup>139</sup> See *Harlem Valley*, 360 F. Supp. at 1060.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1059.

<sup>142</sup> *Id.* at 1060.

<sup>143</sup> *Id.* at 1060 n.2; see Bray, *supra* note 5, at 440.

<sup>144</sup> Bray, *supra* note 5, at 441.

<sup>145</sup> *Id.*

<sup>146</sup> See *Flast v. Cohen*, 392 U.S. 83, 89 (1968) (noting that the Supreme Court contemplated but did not specifically endorse a nationwide injunction); *Harlem Valley*, 360 F. Supp. at 1060.

<sup>147</sup> Berger, *supra* note 30, at 1078.

<sup>148</sup> See *id.* at 1078–79.

<sup>149</sup> *Id.*

2000s “became more frequent and continued to gain prominence.”<sup>150</sup> Under President Obama, there was an increasing amount of nationwide injunctions implemented against a wide array of politically divisive social issues.<sup>151</sup> These injunctions garnered more recognition in the media than those issued against the labor policies and environmental regulations of the Bush Administration.<sup>152</sup> “The subject matter of these injunctions included[:] a school bathroom policy for transgender students, hospice Medicare reimbursements[.] . . . an anti-terrorism law, and the U.S. military’s ‘Don’t Ask Don’t Tell’ policy.”<sup>153</sup>

One particular case against the Obama Administration, *Texas v. United States*, as discussed above, gained considerable recognition.<sup>154</sup> The Supreme Court declined to reverse the Fifth Circuit’s ruling and avoided the specific question of whether a nationwide injunction was permissible.<sup>155</sup> After the Court dodged the issue, there was a floodgate of litigation in which states utilized this tool to combat an array of executive policies under President Trump.<sup>156</sup> Recent cases implementing nationwide injunctions against the Trump Administration have appeared mainly in the context of the Administration’s policies toward immigration and sanctuary cities.<sup>157</sup> The frequency of litigation has ballooned in the past two and a half years,<sup>158</sup> leading to much debate over the propriety of nationwide injunctions. While an increase in these lawsuits was desirable for individuals opposing President Trump’s policies, the current practice is much less appealing to supporters of the Biden Administration. All persons, regardless of political beliefs, should be careful about supporting judges who make bad precedent.

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<sup>150</sup> *Id.* at 1078 (citing Bray, *supra* note 5, at 39).

<sup>151</sup> *See id.*

<sup>152</sup> Compare *Texas v. United States*, 201 F. Supp. 3d 810, 815–16, 836 (N.D. Tex. 2016) (granting a preliminary injunction against the government, who asserted “that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex”), with *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, Nos. C 05-1144 PJH, C 04-4512 PJH 2007 WL 1970096, at \*19 (N.D. Cal. July 3, 2007) (enjoining a forestry rule), and *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 520 (D.C. Cir. 1963) (setting aside a minimum wage in the electrical motors and generators industry).

<sup>153</sup> Berger, *supra* note 30, at 1078.

<sup>154</sup> *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016).

<sup>155</sup> *United States v. Texas*, 136 S. Ct. at 2272.

<sup>156</sup> *See Tolán*, *supra* note 5; *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*3–4 (W.D. Wash. Feb. 3, 2017); *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1144-45 (D. Haw. 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936–37, 951 (N.D. Ill. 2017).

<sup>157</sup> *See supra* note 156.

<sup>158</sup> *See Tolán*, *supra* note 5; Benner, *supra* note 89.

B. *Constitutionality of the Court's Equitable Powers in the Context of Nationwide Injunctions*

Federal courts are granted the “judicial” power directly from Article III of the Constitution.<sup>159</sup> Article III, Section 1 vests the judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>160</sup> Article III, Section 2 holds that “the judicial power shall extend to all cases . . . [and] controversies,” in law and equity that arise under the Constitution.<sup>161</sup> Through this direct delineation, federal courts have jurisdiction over nine different forms of cases or controversies.<sup>162</sup> However, Congress may establish lower federal courts, other than the Supreme Court, as it sees fit.<sup>163</sup>

The initial debate regarding the validity of nationwide injunctions hinged on the scope of the federal courts’ equitable power under Article III, Section 2.<sup>164</sup> One position against broad injunctions, held by Professor Samuel Bray, contends that Article III, Section 2 gives federal courts the “power to decide cases for parties, not questions for everyone,”<sup>165</sup> and “federal courts are obligated to trace their equitable doctrines and remedies to the historic tradition of equity.”<sup>166</sup> The opposing position asserts that the courts “have always had authority to issue equitable relief that encompasses nonparties,” and “the historical understanding of the ‘judicial power’ does not bar modern courts from issuing broad equitable relief.”<sup>167</sup>

The historical practices of federal courts help to illuminate the constitutional debate over the permissibility of nationwide injunctions.<sup>168</sup> Professor Sohoni

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<sup>159</sup> See U.S. CONST. art. III.

<sup>160</sup> See U.S. CONST. art. III, § 1.

<sup>161</sup> U.S. CONST. art. III, § 2.

<sup>162</sup> *Id.*

<sup>163</sup> U.S. CONST. art. III, § 1.

<sup>164</sup> See *id.*; Bray, *supra* note 5, at 421; Frost, *supra* note 104, at 1080–81.

<sup>165</sup> Bray, *supra* note 5, at 421 (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011); *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

<sup>166</sup> Bray, *supra* note 5, at 421 (citing *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–29 (1999)); Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003)).

<sup>167</sup> Frost, *supra* note 104, at 1081 (claiming that “historical antecedents such as the bill of peace illustrate that federal courts have long exercised such authority”).

<sup>168</sup> Joe Carter, *Justice Scalia's Two Most Essential Speeches*, ETHICS & RELIGIOUS LIBERTIES COMM’N (Feb. 18, 2016), <https://erlc.com/resource-library/articles/justice-scalias-two-most-essential-speeches> (quoting Justice Antonin Scalia when he said, “[Our] manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people.”).

cites *Lewis Publishing Co.* and *Pierce* in arguing that “[a]s far back as 1913, the Supreme Court” has issued preliminary injunctions applying to non-parties.<sup>169</sup> *Lewis Publishing Co.* and *Pierce* are contrary to certain conclusions articulated by Professor Bray regarding courts’ limited equitable power.<sup>170</sup> The fact that the Court did not see an injunction applied to non-parties as inherently unconstitutional lends support to the proposition that a broad injunction with a statewide effect would be a permissible compromise position.<sup>171</sup> Bray’s contention that there are certain equitable limitations on the courts garners more force in the context of litigation based on federal law or litigation seeking a nationwide injunction.<sup>172</sup> The idea that an injunction may apply to non-parties on a statewide level appears, by all measures, to be acceptable as a traditional function of courts in equity.<sup>173</sup> However, the jump from applying an injunction with a statewide effect to an injunction applied on a “universal” or nationwide level is not necessarily warranted simply because it is possible that an injunction may apply to some non-parties in the context of a plaintiff seeking broad injunctive relief.<sup>174</sup> In the historical context of broad injunctions, this has not been the case, nor should it be.<sup>175</sup> It was historically rare for a court to grant injunctive relief to non-parties based on federal law.<sup>176</sup>

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<sup>169</sup> Sohoni, *supra* note 112, at 921, 924–25.

<sup>170</sup> Compare *id.* at 921, with Bray, *supra* note 5, at 421.

<sup>171</sup> See generally Sohoni, *supra* note 112 (rebutting “the proposition that the universal injunction is a recent invention” and that the Supreme Court has “repeatedly approved” injunctions against state laws).

<sup>172</sup> Bray’s argument is based on sound principles in the context of nationwide injunctions, but courts have allowed injunctions applying to non-parties in litigation against state laws. See Bray, *supra* note 5, at 421; see also Sohoni, *supra* note 112, at 921 (“[L]ower federal courts have been issuing injunctions that reach beyond the plaintiffs as to state laws in cases that date back more than a century[.]”).

<sup>173</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925); Sohoni, *supra* note 112, at 926; see also Frost, *supra* note 104, at 1081 (“[H]istorical practice supports the conclusion that courts have always had authority to issue equitable relief that encompasses nonparties.”).

<sup>174</sup> See Samuel Bray, *Finally, a Court Defends the National Injunction*, VOLOKH CONSPIRACY (Oct. 14, 2017, 10:04 PM), <https://reason.com/2017/10/14/finally-a-court-defends-the-na/> (arguing that the “intuition behind” a court justifying national injunctions based on a theory that the rule of law is undermined if a court allows illegal conduct to continue in other jurisdictions is “understandable,” but ultimately misguided because we do not have a legal system that is “built on the premise that one district judge should try to determine the law for the entire country”).

<sup>175</sup> *Id.* (arguing that we do not have a legal system that is “built on the premise that one district judge should try to determine the law for the entire country”); OFF. OF ATT’Y GEN., *supra* note 1, at 2 (“The Supreme Court, from early in its history, has interpreted the equitable power of Article III courts as the power ‘to render a judgment or decree upon the rights of the litigant parties’ consistent with the exercise of such powers at common law or in English courts of equity.” (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838))).

<sup>176</sup> See *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 535 (D.C. Cir. 1963) (citing *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 923 (1958)).

Traditionally, in litigation over federal law or executive actions, parties either sought an injunction that applied to the plaintiffs of a case,<sup>177</sup> or they sought declaratory relief.<sup>178</sup> In adhering to those principles, a nationwide injunction should not be the foremost or desired remedy.<sup>179</sup> In essence, the argument that the court is restrained from applying an injunction to non-parties based on a traditional notion of equity is persuasive,<sup>180</sup> but overall, it may not be the most forceful basis to critique or curb the use of nationwide injunctions. The stronger argument against the current application of nationwide injunctions rests on the constitutional limitation of standing for federal courts.<sup>181</sup> The idea that a party requires a concrete and particularized injury<sup>182</sup> supports the proposition that modern-day nationwide injunctions are impermissible more than any equitable limitation of the court.

### III. ISSUES PRESENTED BY AN EXPANSION OF STATE STANDING

A more pervasive and growing argument against the current practice of state actors seeking nationwide injunctions through the federal court system lies in standing limitations that stem from Article III's case or controversy requirement.<sup>183</sup> "Standing" is the idea that an individual or entity may only bring a lawsuit if they have "enough cause to 'stand' before the court."<sup>184</sup> The Court has stated that Article III's requirement of "standing is built on a single basic

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<sup>177</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583–84 (1952).

<sup>178</sup> *See South Dakota v. Dole*, 483 U.S. 203, 205 (1987); *United States v. Windsor*, 570 U.S. 744, 744 (2013); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>179</sup> *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>180</sup> *See Bray*, *supra* note 5, at 421.

<sup>181</sup> *See Baker v. Carr*, 369 U.S. 186, 204 (1962); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) ("At the core of the standing doctrine is the requirement that a plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."); *Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663 (1993); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–62 (1992).

<sup>182</sup> *See supra* note 181 and accompanying text.

<sup>183</sup> *See* U.S. CONST. art. III.

<sup>184</sup> *See What is Legal "Standing"?*, ALL. DEFENDING FREEDOM, <http://www.adfmedia.org/files/WhatIsStanding.pdf> (last visited June 9, 2021) ("[C]ourts use 'standing' to ask" . . . whether a party has "a 'dog in [the] fight.'"); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) ("[T]o invoke the judicial power to determine the validity of executive or legislative action . . . [an individual] must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."); *Tyler v. Judges of Ct. of Registration*, 179 U.S. 405, 407, (1900) ("No one can be a party to an action if he has no interest in it. A plaintiff cannot properly sue for wrongs that do not affect him."); *Fairchild v. Hughes*, 258 U.S. 126, 129–30 (1922) (noting that a plaintiff does not have the right to "secure by indirection a determination whether a statute . . . [is] valid," rather a plaintiff "has only the right . . . to require that the Government be administered according to law").

idea—the idea of separation of powers.”<sup>185</sup> Under Article III, Section 2, a federal court may only hear a case or controversy that meets the three requirements of standing.<sup>186</sup> These requirements are: (1) injury-in-fact, (2) causation, and (3) redressability.<sup>187</sup> A limitation on standing to demand the three traditional requirements<sup>188</sup> would not restrict an injunction from applying to non-parties. However, it would restrict the scope of an injunction to apply only to those with direct injuries.<sup>189</sup> Under the injury-in-fact requirement, the party filing suit must have “some direct injury that is suffered or threatened.”<sup>190</sup> A direct injury must be “concrete and particularized,” as well as “actual or imminent, not conjectural or hypothetical.”<sup>191</sup> Under the causation requirement, the injury must be “fairly traceable to the challenged action of the defendant.”<sup>192</sup> Lastly, under the redressability requirement, the plaintiff must show that “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>193</sup> The following section details how state standing has been expanding in the context of nationwide injunctions against the Trump Administration in the wake of *Massachusetts v. EPA* and *Texas v. United States*.

#### A. State Standing in the Context of *Massachusetts v. EPA* and *Texas v. United States*

*Massachusetts v. EPA* expanded the notion that sovereign states were afforded special consideration in determining standing, rather than simply focusing on the direct and concrete injury that Massachusetts was able to articulate.<sup>194</sup> In *Massachusetts*, the plaintiffs<sup>195</sup> sought review of the EPA’s order denying a rulemaking petition to address “greenhouse gas emissions from new

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<sup>185</sup> *Allen v. Wright*, 468 U.S. 737, 752, (1984).

<sup>186</sup> *See Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>187</sup> *Allen*, 468 U.S. at 751.

<sup>188</sup> *Id.*

<sup>189</sup> Traditional theories of standing cut against the grain of third party standing and various *parens patriae* theories that violate the traditional standing requirements. *Compare* *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 949–50 (N.D. Ill. 2017) (claiming that the city would suffer a harm based on their “relationship with the immigrant community” and that although there was no measurable financial injury they would suffer a “constitutional injury”), *with* *Baker v. Carr*, 369 U.S. 186, 204 (1962), *and* *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring).

<sup>190</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 488, (1923).

<sup>191</sup> *See Friends of the Earth*, 528 U.S. at 180; *Lujan*, 504 U.S. at 560.

<sup>192</sup> *See Friends of the Earth*, 528 U.S. at 180–81; *Lujan*, 504 U.S. at 560–61.

<sup>193</sup> *See supra* note 192.

<sup>194</sup> *Massachusetts v. EPA*, 549 U.S. 497, 515, 517–18 (2007) (“It is of considerable relevance that the party seeking review . . . is a sovereign State and not . . . a private individual.”).

<sup>195</sup> *Id.* at 510, 514.

motor vehicles under § 202 of the Clean Air Act.”<sup>196</sup> The State of Massachusetts claimed it had standing to challenge the EPA based on the particularized injury of “projected rises in sea level,” caused by global warming, which “would lead to serious loss of coastal property.”<sup>197</sup> At the circuit level, in his dissent, Judge Tatel argued that the plaintiffs’ affidavits “supported the conclusion that [the] EPA’s failure to curb greenhouse gas emissions contributed to the sea level changes that threatened Massachusetts’ coastal property.”<sup>198</sup> Judge Tatel reasoned that such injury was traceable to the EPA because “[a]chievable reductions in emissions of [carbon dioxide] and other [greenhouse gases] from U.S. motor vehicles would . . . delay and moderate many of the adverse impacts of global warming.”<sup>199</sup>

On appeal, the Supreme Court found that the State of Massachusetts did have standing to sue based on the tangible injuries articulated by Judge Tatel.<sup>200</sup> In addition, the Court outlined a theory of quasi-sovereign standing initially stated by Justice Holmes in *Georgia v. Tennessee Copper Co.*<sup>201</sup> Holmes found that Georgia had standing to sue under its quasi-sovereign capacity over alleged injuries to “the earth and air within its domain,” declaring that the state had “the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”<sup>202</sup> The Court in *Massachusetts* expanded upon this theory by holding that because the state had surrendered its sovereign prerogatives over controlling emissions to “the Federal Government, and Congress has ordered [the] EPA to protect Massachusetts,” special consideration was therefore warranted.<sup>203</sup> Although the Court held that the theory of quasi-sovereign standing was permissible in this context, it was not necessary to determine the case.<sup>204</sup> Massachusetts had satisfied the traditional requirements of standing by showing a substantial and direct injury to their coastline, partially caused by the EPA’s failure to act, which was redressable by a favorable ruling.<sup>205</sup>

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<sup>196</sup> *Id.* at 510.

<sup>197</sup> *Id.* at 515.

<sup>198</sup> *Id.* at 515 (citation omitted).

<sup>199</sup> *Id.*

<sup>200</sup> *See id.* at 522.

<sup>201</sup> *See id.* at 518–19 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)) (“This is a suit by a State for an injury to it in its capacity of *quasi-sovereign* . . . [i]n that capacity the State has an interest independent of and behind the titles of its citizens.”).

<sup>202</sup> *See id.*

<sup>203</sup> *See id.* at 519.

<sup>204</sup> *See id.* at 521–26.

<sup>205</sup> *See id.*

*Massachusetts* was not a case in which a nationwide injunction against the federal government was sought;<sup>206</sup> however, the case's theory of quasi-sovereign standing has been adopted by state actors seeking to implement nationwide injunctions.<sup>207</sup> In utilizing quasi-sovereign interests to assert standing, Professor Jonathan Nash notes that this theory should be allowed for situations in which (1) the federal government preempts an area of state law, and (2) the federal government is underenforcing such "federal law that Congress enacted to address that very same area."<sup>208</sup> In both *Massachusetts v. EPA*<sup>209</sup> and *Texas v. United States*,<sup>210</sup> this was precisely the case.<sup>211</sup> *Massachusetts* surrendered its enforcement power over controlling emissions in reliance that the EPA would enforce the Clean Air Act,<sup>212</sup> and *Texas* surrendered its power to control immigration in reliance that the DHS and other federal agencies would enforce the INA.<sup>213</sup> In *Texas v. United States*, President Obama's DAPA policy was essentially a command to do the exact opposite of what the states had entrusted the federal government to do under the INA.<sup>214</sup> This led the court to conclude that the Obama Administration had virtually abdicated its duty to enforce the country's immigration laws.<sup>215</sup> Even though *Massachusetts* and *Texas* had standing under Professor Nash's test of "sovereign preemption state standing,"<sup>216</sup> both states were able to show a direct injury that met all of the

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<sup>206</sup> See *id.* at 514 (seeking review of an order denying a rulemaking petition).

<sup>207</sup> See David French, *The Nationwide Dysfunction of the District-Court Injunction*, NAT'L REV. (June 6, 2019, 10:34 PM), <https://www.nationalreview.com/magazine/2019/06/24/the-nationwide-dysfunction-of-the-district-court-injunction/> ("[A]ctivists work to match plaintiffs, lawyers, and courts to bring just the right claim in just the right court. Liberal plaintiffs . . . often file suit somewhere in California, especially in San Francisco . . . , [c]onservative plaintiffs . . . seek more hospitable ground in Texas."); see also *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*7 (W.D. Wash. Feb. 3, 2017); *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1149 (D. Haw. 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 950 (N.D. Ill. 2017); Tolan, *supra* note 5.

<sup>208</sup> See Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. L. REV. 201, 201 (2017).

<sup>209</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 510, 519–20 (2007).

<sup>210</sup> See *Texas v. United States*, 809 F.3d 134, 151–53 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

<sup>211</sup> See *Texas v. United States*, 86 F. Supp. 3d 591, 617 (S.D. Tex. 2015) (noting that even if only 25,000 out of the 500,000 DAPA eligible individuals applied "for a driver's license[,] . . . Texas [would bear] a net loss of \$130.89 per license, with total losses in excess of several million dollars"); *Massachusetts*, 549 U.S. at 515–16.

<sup>212</sup> See *Massachusetts*, 549 U.S. at 510, 519–20 ("These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered [the] EPA to protect Massachusetts.").

<sup>213</sup> See *Texas*, 809 F.3d at 153.

<sup>214</sup> See *id.* at 153–54 ("These plaintiff states' interests are like Massachusetts's, . . . [w]hen the states joined the union, they surrendered some of their sovereign prerogatives over immigration . . . [and] these plaintiff states and Massachusetts now rely on the federal government to protect their interests.").

<sup>215</sup> See *id.* at 149–50 (noting that the district court upheld a new theory of "abdication standing" but rejected "the notions that Texas could sue as *parens patriae* on behalf of citizens facing economic competition from DAPA beneficiaries").

<sup>216</sup> See Nash, *supra* note 208, at 201.

traditional requirements of Article III standing.<sup>217</sup> The discussion of alternative theories of standing, under a quasi-sovereign capacity, in both *Texas* and *Massachusetts* was unnecessary to decide the case.<sup>218</sup>

*B. State Standing in the Context of Nationwide Injunctions Against the Trump Administration*

In contrast to both *Massachusetts* and *Texas*, states that brought lawsuits against the Trump Administration have stretched the theory of quasi-sovereign standing to its limits.<sup>219</sup> Every nationwide injunction implemented against the Trump Administration challenged executive action,<sup>220</sup> not executive inaction. No plaintiff asserted that President Trump was “underenforcing” an area of federal law in which the states have forfeited their sovereign interests, but rather they were simply challenging the actions that President Trump had taken without satisfying Article III’s traditional standing requirements.<sup>221</sup> Effectively all nationwide injunctions against the Trump Administration, relying on standing under their “quasi-sovereign interests,” failed to meet the second requirement of “sovereign preemption state standing,”<sup>222</sup> under *Massachusetts*.<sup>223</sup> Courts have continuously stated that “[p]laintiffs cannot manufacture standing merely . . . based on their fears of hypothetical future harm[s]” that are not certain, and “[i]f the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for [Article III] standing simply by making an expenditure based on a nonparanoid fear.”<sup>224</sup> In cases against both President Trump’s “travel ban” and his executive order regarding conditions on sanctuary cities, states have asserted these exact “injuries” over their citizens generally.<sup>225</sup> District judges, commonly in the Ninth Circuit or various left-leaning districts throughout the Northeast and Midwest, have permitted nationwide injunctions

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<sup>217</sup> See *supra* note 211 and accompanying text.

<sup>218</sup> See *supra* note 211 and accompanying text.

<sup>219</sup> See *supra* note 207 and accompanying text.

<sup>220</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018); *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*7–8 (W.D. Wash. Feb. 3, 2017); see also *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017).

<sup>221</sup> See *Nash*, *supra* note 208, at 201; *Mank & Solimine*, *supra* note 8, at 1958–59; see also *Texas*, 809 F.3d at 153 (noting that in this case, Texas was able to meet the Article III standing requirements by asserting a direct injury of “millions of dollars of losses in Texas alone,” whereas cases asserted against the Trump Administration have largely focused on intangible or hypothetical harms).

<sup>222</sup> See *Nash*, *supra* note 208, at 201.

<sup>223</sup> See *Mank & Solimine*, *supra* note 8, at 1958–59 (noting that there is a distinction between a state “invoking quasi-sovereign interests to block federal regulation of its citizens rather than ‘allowing a State to assert its rights under federal law’”).

<sup>224</sup> *Texas*, 809 F.3d at 159 (citation omitted).

<sup>225</sup> See *supra* note 207 and accompanying text.

based on related quasi-sovereign theories of *parens patriae*<sup>226</sup> or “third-party standing” that rest on faint claims of hypothetical and intangible harms.<sup>227</sup>

In *City of Chicago v. Sessions*, Chicago sought a nationwide injunction against the Trump Administration’s executive action imposing new conditions on a federal grant that required the city to permit local law enforcement’s cooperation with the Immigration and Nationalization Service (INS) to determine the citizenship status of persons detained in local correctional facilities.<sup>228</sup> Chicago had a policy that prohibited local law enforcement from cooperating with federal immigration officials.<sup>229</sup> City employees were not allowed to request or provide any information regarding the immigration status of persons that were arrested or detained.<sup>230</sup> The district judge granted a nationwide injunction, in part, and held that Chicago had standing based on a theory that “[t]rust between local law enforcement and the people” would be eroded and “result in increased crime rates.”<sup>231</sup> The judge also claimed that, in any event, the city did not require a showing of irreparable harm because there was a “constitutional injury,” which was sufficient as a matter of law.<sup>232</sup>

The idea that standing does not need to be met to implement a nationwide injunction, based on theories of “constitutional injury,” automatically necessitates a ruling that is contrary to Article III’s case or controversy requirement and Supreme Court precedent.<sup>233</sup> The Supreme Court in *Spokeo, Inc. v. Robins* vacated and remanded the case to the Ninth Circuit to require a finding of a “concrete and particularized” injury.<sup>234</sup> The Court explicitly rejected the Ninth Circuit’s notion that a “violation of a statutory right is usually a sufficient injury,”<sup>235</sup> and in fact required an even more demanding

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<sup>226</sup> See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 593, 602 (1982) (“In order to maintain a *parens patriae* action, the state must articulate an interest apart from the interests of particular private parties, that is, the state must be more than a nominal party” and the state must also assert a “quasi-sovereign interest . . . sufficiently concrete to create an actual controversy between the State and the defendant.”).

<sup>227</sup> See *supra* note 207 and accompanying text.

<sup>228</sup> See *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936–37 (N.D. Ill. 2017).

<sup>229</sup> See *id.*

<sup>230</sup> See *id.* at 938.

<sup>231</sup> See *id.* at 950.

<sup>232</sup> See *id.*

<sup>233</sup> See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543–44 (2016) (stating that “a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a right,” and “Robins cannot satisfy the demands of Article III by alleging a bare procedural violation”); see also Nash, *supra* note 2, at 2009. See generally U.S. CONST. art. III, § 2.

<sup>234</sup> See *Spokeo*, 136 S. Ct. at 1543–44.

<sup>235</sup> See *id.* at 1543 (“Because the Ninth Circuit failed to consider both aspects of the injury-in-fact requirement, its Article III standing analysis was incomplete.”).

“concreteness” standard when the harm is only “intangible.”<sup>236</sup> A plaintiff cannot circumvent the notion of standing by simply claiming that a statutory or constitutional right was violated; the plaintiff must still satisfy the injury-in-fact requirement of standing.<sup>237</sup> The cases cited by the district judge in *City of Chicago v. Sessions* were cases of narrowly tailored, plaintiff-protective injunctions prior to the Supreme Court’s ruling in *Spokeo*.<sup>238</sup> Such assertions are in direct opposition to both traditional limitations on standing, as well as limitations on quasi-sovereign and *parens patriae* standing.<sup>239</sup> Courts should be weary of advancing this proposition. If a “constitutional injury” was sufficient to implement a nationwide injunction, as opposed to a plaintiff-protective injunction, then an unlimited number of plaintiffs could halt executive policy on a nationwide level by asserting that any constitutional right was infringed upon.<sup>240</sup> Allowing a nationwide injunction based on a “constitutional injury” or standing under various quasi-sovereign and *parens patriae* theories, without making a showing of any concrete injury, is undesirable on a bipartisan level because it circumvents Article III’s case or controversy requirement for the expedience of politically motivated lawsuits.

Ultimately, state actors have proven to be plaintiffs that are increasingly bringing cases based on weak claims of injury and unconvincing forms of standing to seek nationwide injunctions as political victories against executive administrations that their constituents oppose.<sup>241</sup> Although the State of Texas, in seeking a nationwide injunction, brought a valid suit based on a direct and verifiable financial harm,<sup>242</sup> it appears to be more of an outlier than the general rule in the current political climate. The various “injuries” asserted to obtain

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<sup>236</sup> See Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2285 (2018) (“The Court indicated that a plaintiff, in order to have constitutional standing, needed to suffer harm that was ‘concrete’ or ‘real’ . . . [and] the Court created a category of ‘intangible’ harm subject to a distinctive, and arguably more demanding, concreteness inquiry than ‘tangible’ harm.”).

<sup>237</sup> See *Spokeo*, 136 S. Ct. at 1543.

<sup>238</sup> See *Doe v. Mundy*, 514 F.2d 1179, 1180 (7th Cir. 1975) (affirming a district court order granting a preliminary plaintiff protective injunction and declaratory relief for a class action suit brought by pregnant women challenging a hospital regulation); *Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011) (reversing the denial of a preliminary injunction against the City of Chicago’s “firing-range ban”).

<sup>239</sup> See *Nash*, *supra* note 2, at 2010 (“[T]hat these doctrines necessarily validate the nationwide injunction is quite a stretch . . . .”); *Texas v. United States*, 809 F.3d 134, 159 (5th Cir. 2015) (stating that “plaintiffs cannot manufacture standing merely . . . based on their fears of hypothetical future harm[s]”); *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 12 (D.D.C. 2018) (“Plaintiffs have failed to meet their burden of plausibly alleging or proffering facts that, if accepted as true, would establish that they have standing to sue.”).

<sup>240</sup> See *Ezell*, 651 F.3d at 689–90.

<sup>241</sup> See *supra* note 207 and accompanying text.

<sup>242</sup> See *supra* note 211 and accompanying text.

state standing have perhaps been taken too far.<sup>243</sup> District judges are now allowing nationwide injunctions based on quasi-sovereign interests in the context of executive action,<sup>244</sup> not underenforcement. Limitations on the scope of an injunction, brought by a state actor in a lower federal court, should be restricted to a singular geographic state to protect the rest of the country from politically motivated actors freezing up the enforcement of executive policies on a nationwide level. Dozens of states, thousands of miles away, should not have a nationwide injunction thrust upon them by an individual state actor who may—or may not—be able to articulate a theory of a direct and verifiable harm.<sup>245</sup>

#### IV. THE GOOD, THE BAD, AND THE POLITICAL FORCES CREATING THE ISSUE

The current academic debate over the permissibility of nationwide injunctions, in an equitable sense, focuses more on the downsides of their implementation, while the issue of relaxed state standing reflects the political motivations and root causes of nationwide injunctions.<sup>246</sup> In merging the two issues to assess how the judicial power is currently being abused, it is relevant to first understand why the drawbacks of nationwide injunctions outweigh any perceived benefit before turning to the political factors looming in the shadows. Recognizing the undesirability of nationwide injunctions, which promote an expansion of state standing and the court's equitable powers,<sup>247</sup> reveals why it is unsavory to allow political forces to take hold of the judicial system. The following section explores the dangers of nationwide injunctions, rebuts their perceived benefits, and discusses the political motivations contributing to the issue.

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<sup>243</sup> See *supra* note 207 and accompanying text.

<sup>244</sup> See *supra* note 211 and accompanying text. See generally Nash, *supra* note 208, at 201 (“Although sovereign preemption state standing could conceivably extend to Executive Branch overenforcement, such an application would not square with the functional justification for the doctrine.”).

<sup>245</sup> See *supra* note 4 and accompanying text.

<sup>246</sup> Compare Frost, *supra* note 104, at 1090 (addressing the costs and benefits of nationwide injunctions, and the equitable authority to issue such injunctions), and Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2102–03 (2017) (focusing on the courts’ power to issue nationwide injunctions as a form of “complete relief”), with Nash, *supra* note 2, at 1992 (discussing the political motivations of states’ attorneys general “to file lawsuits against federal government action and programs with which she and her constituents disagree”).

<sup>247</sup> Compare Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992), with Hawaii v. Trump, 265 F. Supp. 3d 1140, 1149 (D. Haw. 2017).

### A. *Dangers of Nationwide Injunctions*

Former-Attorney General William Barr has stated that “[n]ationwide injunctions undermine the democratic process, depart from history and tradition[,] . . . and impede sound judicial administration, all at the cost of public confidence in . . . our courts as apolitical decision makers.”<sup>248</sup> Many critics of nationwide injunctions echo this position and claim that the use of nationwide injunctions “encourages forum shopping and . . . arrests the development of law in the federal system.”<sup>249</sup> Fundamentally, the dangers of nationwide injunctions generally fall into three broad categories: (1) forum shopping, (2) expansion of the judicial power, and (3) restrictions on federal lawmaking ability.

#### 1. *Forum Shopping*

The first danger of nationwide injunctions is the extensive forum shopping that occurs in seeking out the most favorable ruling.<sup>250</sup> It is no coincidence that injunctions opposing President Obama’s policies have been issued in more conservative judicial districts, while injunctions opposing President Trump’s policies have come out of more liberal districts.<sup>251</sup> State actors seeking to enjoin an executive administration’s policies seek out the most favorable district and circuit to file suit.<sup>252</sup> If an individual district judge upholds an executive policy or declines to hear a case based on a lack of standing, the state actor is not precluded from bringing suit elsewhere.<sup>253</sup> However, once an individual district judge hears a case and issues a nationwide injunction, “the injunction controls the defendant’s actions with respect to everyone.”<sup>254</sup> Professor Bray notes that the incentive to forum shop until the executive policy is invalidated creates a situation in which state actors are forum shopping until “the statute drops.”<sup>255</sup>

#### 2. *Power Grab*

The second danger of nationwide injunctions is the fact that the use of these injunctions “give[s] enormous power to a single district court judge,”<sup>256</sup> which is contrary to the traditional view of how the lower federal courts should

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<sup>248</sup> Benner, *supra* note 89.

<sup>249</sup> Bray, *supra* note 5, at 419.

<sup>250</sup> *See id.*; *see also* Tolan, *supra* note 5.

<sup>251</sup> *See* Bray, *supra* note 5, at 459–60.

<sup>252</sup> *See id.* at 460; *see* Tolan, *supra* note 5.

<sup>253</sup> *See* Bray, *supra* note 5, at 460.

<sup>254</sup> *See id.*

<sup>255</sup> *See id.*

<sup>256</sup> Frost, *supra* note 104, at 1069.

function.<sup>257</sup> As a product of the evolving role of the federal court system, most Americans accept the idea of judicial supremacy of the Supreme Court in reflecting on “the key role that the Court played in the civil rights movement.”<sup>258</sup> However, the notion of expansive “judicial supremacy,” a view that the judicial branch’s pronouncement of the law is supreme, does not necessarily carry over to individual district courts that are subject to further review at the circuit and Supreme Court level.<sup>259</sup> To prevent the accumulation of powers in the judicial branch,<sup>260</sup> there is an inherent need to strike a balance between judicial review from a panel of nine Justices, and the implementation of nationwide injunctions at the hands of a single district judge.<sup>261</sup> Lower federal courts should seek to maintain their prior function of simply refusing to apply an unconstitutional law, *vis-à-vis* a declaratory judgement, rather than preemptively “striking down” the law before the Supreme Court has had the benefit of multiple pronouncements.<sup>262</sup>

### 3. *Development of Law*

The third danger of nationwide injunctions is that they hinder the efficient development of law in the federal system. Under *United States v. Mendoza*, “the federal government is not subject to non-mutual issue preclusion”; however, once a national injunction is implemented, it essentially freezes the development of law and makes it exceedingly “hard to relitigate a question.”<sup>263</sup> Under the “standard model” of vertical precedent, “lower courts within a geographical jurisdiction are bound by relevant precedent announced by higher courts within that jurisdiction.”<sup>264</sup> A decision announced by the Supreme Court would

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<sup>257</sup> See Bray, *supra* note 5, at 449–52 (“A national injunction in an individual action would be illogical, almost unthinkable.”)

<sup>258</sup> Carson Holloway, *Against Judicial Supremacy: The Founders and the Limits on the Courts*, HERITAGE FOUND. (Jan. 25, 2019), <https://www.heritage.org/courts/report/against-judicial-supremacy-the-founders-and-the-limits-the-courts>.

<sup>259</sup> *Id.*

<sup>260</sup> See generally THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001) (claiming that the accumulation of powers in one branch of the government, “whether of one, a few, or many,” is “the very definition of tyranny” that the federal constitution sought to avoid).

<sup>261</sup> OFF. OF ATT’Y GEN., *supra* note 1, at 4 (“The Supreme Court has explicitly affirmed the importance of percolation in the lower courts—particularly when the government is involved[.]”); see also Holloway, *supra* note 258 (“[T]his expansive modern understanding of the judicial power is inconsistent with the argument put forward in the single most authoritative commentary on the Constitution to emerge from the founding, *The Federalist* [Papers].”).

<sup>262</sup> See Bray, *supra* note 5, at 451; see also *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

<sup>263</sup> Berger, *supra* note 30, at 1072.

<sup>264</sup> Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1455 (2010).

effectively resolve the matter.<sup>265</sup> However, once a “policy is enjoined nationwide,” the government “cannot enforce it, the regulated parties do not sue, and courts never hear the issue again[;] . . . [t]he law is frozen against the government.”<sup>266</sup> This freezing of the law by an individual district court occurs because enforcement of the executive policy constructively disappears.<sup>267</sup> Nonenforcement of the executive policy on a nationwide scale “breaks down” the federal precedential system by preventing a contrary ruling from another district or circuit.<sup>268</sup> The only way for the government to challenge an adverse ruling is to appeal the case to the circuit presiding over the district in which the decision was initially made.<sup>269</sup> Because state actors have already forum shopped to find the most favorable district judge and circuit to file within, the government is fighting an uphill battle.<sup>270</sup>

Geographically restricting a district court’s power to implement an injunction would allow the government to continue to enforce an executive policy in any and all states that have not successfully brought suit to enjoin the policy.<sup>271</sup> Allowing a diversity of opinion among the circuits is recognized as an essential function of the lower courts, especially in the context of important legal issues.<sup>272</sup> Justice Ruth Bader Ginsburg has noted, “we have in many instances recognized that 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 final pronouncement by this Court.”<sup>273</sup>

### *B. Rebutting the Cited Benefits of Nationwide Injunctions*

Some frequently cited benefits of nationwide injunctions include: (1) complete relief to plaintiffs,<sup>274</sup> (2) protection of nonparties from “irreparable

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<sup>265</sup> See *id.* at 1455–56.

<sup>266</sup> Berger, *supra* note 30, at 1087.

<sup>267</sup> See *id.* at 1072.

<sup>268</sup> See Dobbins, *supra* note 264, at 1456.

<sup>269</sup> See Bray, *supra* note 5, at 460.

<sup>270</sup> See *id.*; Tolan, *supra* note 5.

<sup>271</sup> See Berger, *supra* note 30, at 1086–87.

<sup>272</sup> *Id.* at 1086–88 (noting that “short-term circuit splits are beneficial, not detrimental”); see *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

<sup>273</sup> *Evans*, 514 U.S. at 23 n.1 (Ginsburg, J., dissenting).

<sup>274</sup> See Frost, *supra* note 104, at 1090–91; Siddique, *supra* note 246, at 2111–12; see also *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (arguing that in the context of a class action brought under Rule 23, a nationwide class is not “inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established”).

injury,”<sup>275</sup> (3) administrability,<sup>276</sup> and (4) uniformity in law.<sup>277</sup> The thrust of the arguments in favor of broad injunctions lie in the principle that the judicial system values uniformity and efficiency.<sup>278</sup> However, “uniformity” must be balanced with “regional percolation.”<sup>279</sup> The concept of uniformity does not necessarily have to be nationwide. Uniformity within a circuit or district may be broad enough to easily administer and provide relief to affected plaintiffs without foreclosing the essential “periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts.”<sup>280</sup> An injunction limited to statewide application, when a state actor is the party bringing suit, can create sufficient diversity in opinion to allow the Supreme Court to have a well-developed body of law if it decides to address an issue with potential nationwide implications.<sup>281</sup> Many contemporary cases currently being litigated would be well suited to a statewide injunction. Specifically, litigation regarding the Trump Administration’s policy toward sanctuary cities did not require a nationwide injunction; it was primarily an issue for specific cities.<sup>282</sup> In the event that a geographically limited injunction is impracticable, a state actor can always bring suit seeking declaratory relief.<sup>283</sup>

Professor Amanda Frost claims that “certain types of federal policies with nationwide effects” would be “extremely difficult to enjoin application of the policy to some plaintiffs but not others.”<sup>284</sup> While this may be true for some specific cases, it is important to note that these plaintiffs are not without recourse. If a state actor brings suit and a statewide injunction is not practicable, the court system is still available to hear the case and issue a declaratory judgment if standing is met.<sup>285</sup> This practice was traditionally how the overwhelming majority of courts approached national issues.<sup>286</sup> *National*

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<sup>275</sup> See Frost, *supra* note 104, at 1094–95.

<sup>276</sup> See *id.* at 1098.

<sup>277</sup> Berger, *supra* note 30, at 1071.

<sup>278</sup> *Id.* at 1071–72.

<sup>279</sup> *Id.*

<sup>280</sup> *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

<sup>281</sup> See *id.*

<sup>282</sup> This policy dealt with funding for specific sanctuary cities. If a city had chosen not to follow the policy, the only consequence was that the individual city would receive less federal funding. See *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 935–36 (N.D. Ill. 2017).

<sup>283</sup> See generally Bray, *supra* note 5, at 451 (“The traditional conception is that a judge does not so much strike down an unconstitutional law as refuse to apply it[.]”).

<sup>284</sup> See Frost, *supra* note 104, at 1069.

<sup>285</sup> See Bray, *supra* note 5, at 450–51, 461.

<sup>286</sup> See *id.* (noting that, in *National Federation of Independent Business v. Sebelius*, the federal district court judge in Florida practiced “judicial self-restraint” in taking the traditional approach of “having . . . decided that the entire statute was unconstitutional” without granting a nationwide injunction, which is contrary to the

*Federation of Independent Business v. Sebelius* perfectly illustrates how a case implicating “certain types of federal policies with nationwide effects” could be decided without utilizing a nationwide injunction.<sup>287</sup>

*Sebelius* involved the constitutional validity of the individual mandate under the Affordable Care Act, which required persons to either maintain health insurance or pay a “shared responsibility payment.”<sup>288</sup> Prior to the Supreme Court hearing the case, a “federal district court judge in Florida held the individual mandate unconstitutional, and also held that it could not be severed.”<sup>289</sup> In reaching this holding, the district court “could easily have concluded that enforcement of the statute should be enjoined throughout the country,” but instead chose to grant a declaratory judgment, which allowed the Department of Health and Human Services (HHS) to continue plans for carrying out the statute.<sup>290</sup> If the district judge had implemented a nationwide injunction, “HHS would have lost seven and a half irreplaceable months for preparing to roll out the regulations for the statute.”<sup>291</sup> As seen in *Sebelius*, if an issue is one of grave national significance, the Supreme Court can elect to hear the case and make a final pronouncement of the law.<sup>292</sup> This, in turn, would allow the executive policy to continue to be enforced until the Supreme Court issues a decision.<sup>293</sup> Ultimately, the arguments in favor of nationwide injunctions are outweighed by their pitfalls of freezing out the rule of law and subjecting the judicial system to a political supermarket to find the most favorable judge to the state’s case.<sup>294</sup>

### C. Political Factors Leading to Nationwide Injunctions

The two primary factors leading to the rise of nationwide injunctions are (1) the increasing geographic political polarization of U.S. voters, coupled with (2) the political incentives of state attorneys general to file suit against the federal government.<sup>295</sup> These two factors are intertwined in a tragedy of the

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“change for some judges in their self-conception of what they are doing *vis-à-vis* an unconstitutional statute”).

<sup>287</sup> See Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 567 U.S. 519 (2012). *Contra* Frost, *supra* note 104, at 1069 (arguing that in some contexts nationwide injunctions are “the only means to provide plaintiffs with complete relief” and “anything short of a nationwide injunction would be impossible to administer”).

<sup>288</sup> See *Sebelius*, 567 U.S. at 519.

<sup>289</sup> Bray, *supra* note 5, at 460.

<sup>290</sup> See *id.* at 460–61.

<sup>291</sup> *Id.* at 461.

<sup>292</sup> See *Sebelius*, 567 U.S. at 519; see also Dobbins, *supra* note 264, at 1455–56.

<sup>293</sup> Dobbins, *supra* note 264, at 1455–56.

<sup>294</sup> Tolan, *supra* note 5.

<sup>295</sup> See ECONOMIST, *supra* note 31; Nash, *supra* note 2, at 1992.

commons-like situation that favors the self-interests of those utilizing a nationwide injunction as a political tool to the detriment of democracy.

### 1. *Political Polarization on a Geographic Level*

“Americans are increasingly choosing to live among like-minded neighbors,” which has led to a clustering of similar political beliefs on a geographic level.<sup>296</sup> The electoral geography of the United States has become clustered at a district and county level; “the proportion of Americans who live in . . . landslide counties” nearly doubled from 26.8% for the 1976 election of President Jimmy Carter to 48.3% for the 2004 reelection of President George W. Bush.<sup>297</sup> Party affiliation by state and district reaffirms the common notion that certain areas of the country show a political preference.<sup>298</sup> The theory of “political segregation” results in certain states and areas of the country being regarded as more politically homogenous, thereby creating a simple proxy to guide state attorneys general in thwarting divergent policies.<sup>299</sup> This concept is supported by the fact that nationwide injunctions opposing executive actions seemingly correspond with the relative political leanings of the district and state in which an individual district judge presides.<sup>300</sup> Many critics of former-President Trump tout California’s perceived success in utilizing nationwide injunctions against his Administration.<sup>301</sup> However, Paul Nolette, a “Marquette political science professor . . . tracking all multi-state lawsuits against the Trump [A]dministration,”<sup>302</sup> has noted that “[a] big part of [California’s success] is venue-shopping,” and that “California . . . has the ability to file in one of the most . . . [liberal] districts in the country.”<sup>303</sup>

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<sup>296</sup> ECONOMIST, *supra* note 31.

<sup>297</sup> *Id.*

<sup>298</sup> See *Party Affiliation by State (2014)*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/state/> (last visited June 9, 2021).

<sup>299</sup> See ECONOMIST, *supra* note 31; see also Nash, *supra* note 2, at 1991–92 (“The increase in political polarization across the nation has resulted in some states being solidly ‘red’ or Republican, while other states being solidly ‘blue’ or Democratic.”).

<sup>300</sup> See PEW RSCH. CTR., *supra* note 298; *Texas v. United States*, 809 F.3d 134, 146 (2015); *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*3–4 (W.D. Wash. Feb. 3, 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017).

<sup>301</sup> See Tolan, *supra* note 5; see Chris Nichols, *Is California Really ‘Winning’ in Court Against the Trump Administration?*, POLITIFACT (Sept. 25, 2019), <https://www.politifact.com/california/statements/2019/sep/25/xavier-becerra/california-really-winning-court-against-trump-admi/>.

<sup>302</sup> Nichols, *supra* note 301.

<sup>303</sup> Tolan, *supra* note 5.

## 2. Political Motivations of State Attorneys General

The increasing use of nationwide injunctions filed by state actors is also attributable to a state attorney general's independent political motivations, not just those of their citizens generally.<sup>304</sup> The belief that a nationwide injunction can be used as an offensive tool to strike down “government statutes, regulations, and programs” makes them ripe political capital if an individual state attorney general is able to score a “victory” for their solidly “red” or “blue” state against a presidential administration of an opposing party.<sup>305</sup> Almost every state elects their attorney general for a term of four years,<sup>306</sup> and if the attorney general is popular, they often run for governor.<sup>307</sup> In a period of heightened political polarization,<sup>308</sup> the incentive for a state attorney general to seek out a nationwide injunction is at its apex.<sup>309</sup> The fact that state attorneys general are the strategists behind the expansive use of nationwide injunctions is quite ironic considering that, at the federal level, “[t]he Framers of the Constitution” had intended to “place the Attorney General under the control of the President, thereby adopting the model of the unitary executive.”<sup>310</sup> The states rejected the federal model and created independent attorneys general selected by popular election.<sup>311</sup>

These two factors lend support to the idea that an injunction brought about by a state actor should be limited to the respective geographic state. The boundaries of each federal judicial circuit are drawn at various state lines,<sup>312</sup> and

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<sup>304</sup> See Nash, *supra* note 2, at 1992.

<sup>305</sup> See *id.* at 1991–92; see also Bray, *supra* note 5, at 450 (noting an ideological shift in which some judges no longer think “of an injunction against enforcement . . . primarily in antisuit terms” but rather “primarily as a challenge to the law itself”).

<sup>306</sup> See *Attorney General Office Comparison*, BALLOTPEDIA, [https://ballotpedia.org/Attorney\\_General\\_office\\_comparison](https://ballotpedia.org/Attorney_General_office_comparison) (last visited June 9, 2021) (indicating that forty-three states publicly elect their attorney general, one state elects via state legislature, and “[o]f the forty-four elected attorneys general, all serve four-year terms with the exception of Vermont, who serves a two-year term.”).

<sup>307</sup> See Nash, *supra* note 2, at 1992 (claiming that state attorneys general often have “higher political ambitions”).

<sup>308</sup> See Lee Drutman, *American Politics Has Reached Peak Polarization*, VOX (Mar. 24, 2016, 4:20 PM), <https://www.vox.com/polyarchy/2016/3/24/11298808/american-politics-peak-polarization> (illustrating that party polarization is at its highest level since the late 1800s); Jennifer Lynn McCoy, *Extreme Political Polarization Weakens Democracy – Can the US Avoid that Fate?*, CONVERSATION (Oct. 31, 2018, 7:12 AM), <http://theconversation.com/extreme-political-polarization-weakens-democracy-can-the-us-avoid-that-fate-105540> (“Perceptions that ‘[i]f you win, I lose’ grow[,] . . . [and] [e]ach side views the other political party and their supporters as a threat to the nation or their way of life if that other political party is in power.”).

<sup>309</sup> See Nash, *supra* note 2, at 1992.

<sup>310</sup> William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2451 (2006).

<sup>311</sup> *Id.*

<sup>312</sup> *Maps of Judicial Circuits, Judgeships, and Meeting Places*, FED. JUD. CTR., <https://www.fjc.gov/>

each state is divided into one or more judicial districts.<sup>313</sup> To protect individual states, who may support an executive policy, from tyranny, the effect of a broad injunction should be restricted geographically. Allowing a handful of individual district judges and state attorneys general to dictate policy for the entire nation is a harrowing concept. As David French writes, “[c]ourts are supposed to be the refuge of the illegally oppressed, not a haven for the politically aggrieved.”<sup>314</sup>

## V. PROPOSED SOLUTION: STATEWIDE LIMITATION TO INJUNCTIONS BROUGHT BY STATE ACTORS

To revert back to the traditional principles of standing, the Supreme Court should course correct the ever-expanding interpretation of *Massachusetts v. EPA*.<sup>315</sup> The Court should not have to wait too long to address this issue considering the attenuated theories of standing that have been asserted to implement nationwide injunctions.<sup>316</sup> Although the Court declined to address the issue in *Department of Homeland Security v. New York*, Justice Gorsuch’s effective concurrence strikes at the heart of the frustration.<sup>317</sup> Justice Gorsuch pleaded for the court to address the issue by stating that “[i]t has become increasingly apparent that this Court must, at some point, confront . . . this increasingly widespread practice,” and the hysteria of rushing “from one preliminary injunction hearing to another,” instead of “methodically developing arguments and evidence, . . . is not normal.”<sup>318</sup>

In conjunction with a judicial pronouncement on the issue of standing, Congress should enact concrete federal legislation geographically limiting an injunction sought out by individual state actors as a fallback measure. If concrete legislation addressing state actors is not implemented, the various state attorneys general could continue to extensively forum shop for the most favorable district to implement a nationwide injunction.<sup>319</sup> This practice would inevitably chip away at any pronouncement by the Court on the issue of standing.<sup>320</sup> A strict geographic limitation on state attorneys general seeking a broad injunction

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history/exhibits/graphs-and-maps/federal-judicial-circuits (last visited June 9, 2021).

<sup>313</sup> *About U.S. Federal Courts*, FED. BAR ASS’N, [http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts\\_1.aspx](http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx) (last visited June 9, 2021).

<sup>314</sup> *See French, supra* note 207.

<sup>315</sup> *See supra* note 4 and accompanying text.

<sup>316</sup> *See supra* note 207 and accompanying text.

<sup>317</sup> *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

<sup>318</sup> *Id.*

<sup>319</sup> *See Tolan, supra* note 5.

<sup>320</sup> *See generally* Bray, *supra* note 5, at 451–52 (noting the common ideological shift of some judges and when they believe unconstitutional statutes, regulations, etc., should be “struck down”).

would be necessary to prevent a relapse to the judicial system's current situation. This section will set forth a two-part solution: (1) advocating for a traditional interpretation of the injury requirement in standing, and (2) imposing a geographic limit to an injunction brought by state actors.

#### *A. Encouraging Judicial Restraint and Addressing Standing*

The judicial branch is vested with the “power to decide cases for parties, not questions for everyone.”<sup>321</sup> Nationwide injunctions represent a constitutionally murky and politically undesirable headache for the efficient governing of the country.<sup>322</sup> Courts should seek to peel back recent expansions to the doctrine of standing<sup>323</sup> and exercise judicial restraint when addressing cases in which the plaintiff seeks a nationwide injunction.<sup>324</sup> The Supreme Court should revisit the standing doctrine to delineate limits to *Massachusetts v. EPA* and various other forms of third-party and quasi-sovereign standing.<sup>325</sup> The Court should explicitly reject the contention that “hypothetical” and “intangible” harms to a state's citizens are permissive grounds to bring suit, and clarify that only a direct and tangible injury is sufficient to meet standing.<sup>326</sup> Reverting back to a time when standing required an injury-in-fact would act as a screener to ferret out suits challenging executive action without a concrete injury.<sup>327</sup>

#### *B. Federal Legislation as a Concrete Solution*

As a fallback measure, when appeals to judicial restraint and standing limitations fail, Congress should limit an injunction brought by a state actor to the geographic state in which the enjoining district judge presides through federal legislation. The recent idea that a lower federal court can offensively challenge the validity of a statute or executive policy can lead to a strained reading of any pronouncement by the Supreme Court on the issue of standing.<sup>328</sup> Previous bills proposed by Congress have failed to gain much bipartisan support because they focused on limiting courts' equitable power to the specific parties

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<sup>321</sup> *Id.* at 421 (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011); *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

<sup>322</sup> *See id.*; Nash, *supra* note 2, at 1992 (“[T]o the extent that litigants have a choice among courts that might rule differently on the merits, litigants and lawyers may have an opportunity, and indeed an incentive, to forum shop.”).

<sup>323</sup> *See supra* note 4 and accompanying text.

<sup>324</sup> *See Bray, supra* note 5, at 460–61.

<sup>325</sup> *See Massachusetts v. EPA*, 549 U.S. 497, 517, 518 (2007).

<sup>326</sup> *See supra* note 189 and accompanying text.

<sup>327</sup> *Allen v. Wright*, 468 U.S. 737, 740, 746, 751 (1984).

<sup>328</sup> *See Bray, supra* note 5, at 451.

of a particular suit as opposed to placing limits on the geographic scope of an injunction.<sup>329</sup> In addition to the lack of support for such proposals, passing a law proscribing a limit of an injunction to only the parties of a suit still creates the potential for a “quasi-national injunction” by allowing dozens of states to join a lawsuit to gain party status.<sup>330</sup> Limiting an injunction to only apply to parties does little to curb the abuse of the judicial power when all of the individual states could theoretically join a single lawsuit.<sup>331</sup>

Federal legislation passed should require any state attorney general seeking an injunction against a federal law or executive policy, to file suit in a district court located within their respective state. If a district court finds standing based on a direct injury and believes that a statewide injunction, as opposed to a declaratory judgment, is feasible and proper, the court may then prescribe a geographically limited statewide injunction against enforcement of the executive policy for the individual state bringing suit. If the federal government appeals such a ruling to the circuit level of that district, the circuit court is restricted from broadening any injunction and may only affirm or reverse the case. Restricting the circuit courts from broadening an injunction beyond a statewide effect, as opposed to a circuit-wide injunction, is necessary to protect other states’ interests within a geographic circuit that may support an executive policy.<sup>332</sup> Critics of geographic limitations claim that in some cases a geographically limited injunction would be unworkable. However, even if a statewide injunction has no net effect on enjoining an executive policy, as would be the case in some immigration contexts,<sup>333</sup> the injunction would still carry the force of a declaratory judgment, which was sufficient relief for the first century and a half of the nation’s judicial history and more recently in *Sebelius*.<sup>334</sup>

Geographically limiting an injunction brought by a state actor is a better bright-line solution because it is not subject to any broad form of interpretation. A geographic limitation is permissible because Congress’s authority to define

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<sup>329</sup> See Injunctive Authority Clarification Act of 2018, 115 H.R. 6730.

<sup>330</sup> See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015) (noting that over half of U.S. states joined as parties to the litigation against DAPA).

<sup>331</sup> See *id.*

<sup>332</sup> Some states located in the Ninth Circuit are conservative. For example, Idaho and Montana are generally safely Republican states with around 60% of their citizens voting for Trump in 2016, while over 60% of the citizens in California and Hawaii voted for Hillary Clinton. See *Historical Presidential Election Information by State*, 270 TO WIN, <https://www.270towin.com/states/> (last visited June 9, 2021); see ECONOMIST, *supra* note 31; PEW RSCH. CTR., *supra* note 298.

<sup>333</sup> See *Texas*, 809 F.3d at 188 (“[A] geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.”).

<sup>334</sup> See *supra* notes 105 and 290.

the scope of lower federal courts lies within a textually demonstrable commitment to the legislative branch.<sup>335</sup> The Supreme Court, or a court of appeals, could effectively strike down the actions of a rogue district judge with relative ease by simply holding that a nationwide injunction is prohibited under federal law. Gretzel Berger has previously proposed a “circuit-border” rule to be implemented by the Supreme Court.<sup>336</sup> In 2017, he believed that the Court would implement such a rule through the “travel-ban” cases.<sup>337</sup> The Supreme Court did not address the issue in 2018,<sup>338</sup> and it declined to set out a geographic solution again in 2020.<sup>339</sup> Therefore, federal law looks to be a better solution.

### CONCLUSION

The judicial branch is currently at risk of becoming a political tool at the hands of the various state attorneys general.<sup>340</sup> The Framers intended the federal court system to issue unbiased decisions and to be insulated from political whims. The current practice of issuing nationwide injunctions against significant executive policies based on hypothetical and intangible harms has caused a vast expansion to traditional standing requirements and the court’s equitable power.<sup>341</sup> Previous appeals to the Supreme Court to address the issue of nationwide injunctions and standing have proven fruitless.<sup>342</sup> Politically motivated state attorneys general, coupled with individual district judges willing to grant nationwide injunctions, are the culprits behind the problem. A geographic solution tailored to address these individuals is appropriate. Enacting these limitations on lower courts would curb the abuse of the judicial power, and hopefully restore the public’s confidence in the judicial branch.<sup>343</sup> The executive

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<sup>335</sup> See U.S. CONST. art. III, § 1.

<sup>336</sup> Berger, *supra* note 30, at 1105.

<sup>337</sup> *Id.*

<sup>338</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>339</sup> *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020) (Gorsuch, J., concurring).

<sup>340</sup> See Nash, *supra* note 2, at 1992.

<sup>341</sup> See *supra* Part III.

<sup>342</sup> See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016); *Trump*, 138 S. Ct. at 2423.

<sup>343</sup> See Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), <https://news.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx>.

and legislative branches have enough politics—the judicial system should stick to the law.

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